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CONVEYANCER'S NOTEBOOK.

Mortgages — Treasury sanction for loan — validity.—Attention should be drawn to the problem created by the Orders for Emergency Powers (Defence) Finance. These orders, 1939, Nos. 1620, 1621, being the most recent, are primarily directed to restricting capital issues without Treasury sanction. The lowest limit to which the orders apply has been raised from £5,000 to £10,000 as from September 23, 1939, but the amount is calculated on transactions taking place within twelve months, so that a succession of smaller transactions will not be protected if the total exceeds that amount : 1939, No. 1621, para. 1.

These orders, and the order which has been superseded (1939, No. 1067), have been so framed that they cover ordinary mortgage transactions. Consequently, Treasury sanction is required for a mortgage exceeding £10,000. Under the existing orders failure to get this sanction does not render the mortgage invalid, but the principal order 1620 only applies to transactions after November 23, 1939. Under the previous order it would appear that the mortgage would be invalidated. This may have a serious effect on titles if the law is not amended, but it is felt that something will no doubt be done to clarify the position. In the meantime practitioners must be on their guard, not only when handling mortgage transactions, but also where substantial mortgages created after the present emergency appear on the title. In the circumstances it does not seem that a fuller note is called for until the mind of the Treasury has been made clearer to the public.

Registered land—covenants for indemnity.—Attention is called to *Cator v. Newton and Bates*, [1939] 4 All E. R. 457, which it is proposed to note in the next issue. The importance of the case lies in the fact that the Court of Appeal decided that, where land is subject to positive covenants but the transfer contains no express covenant for indemnity, the covenantee can bring an action for damages against the covenantor, but the transferee is not liable apparently either to the covenantee or the covenantor. Attention has before been called in this Review to the importance of completing forms of transfer with such additional covenants as may be necessary based on the practice of unregistered conveyancing. It is hoped that this case may make it clear to practitioners that the completion of transfers requires more thorough consideration than it sometimes receives.

Powers of trustees to invest in securities issued under the National Loans Act, 1939.—Section 4 of the National Loans Act, 1939, gives trustees power to invest in securities issued under this Act. The section further provides that trustees shall not be liable for any loss resulting from such investments or from the sale of any securities for such investments or from the exercise of any option to convert any securities into securities issued under this Act. Trustees are authorised to exercise the powers given them under the section notwithstanding anything to the contrary contained in any instrument creating the trust, and they may act without the consent of any other person, even though the consent of such person is required by the instrument creating the trust.

Trustee is defined by section 4 (2) as any person acting in a fiduciary capacity whether pursuant to a deed or other instrument or by virtue of the duties incident to the holding by that person of any office (including the office of personal representative), but does not include a person so acting under an implied or constructive trust, not being a resulting trust arising from the failure or determination of an express trust.

Section 4 (3) provides that any limitation, no matter how it is imposed, on the powers of any company or body of persons or of the persons responsible for the management of any company or body of persons, to lend money to the Government or to invest in, hold or purchase securities issued under this Act shall have no effect; and the persons responsible for the direction or management of the company or body of persons are expressly authorised to invest in, hold or purchase such securities without regard to such limitation.

The above-mentioned provisions go much further than those contained in the War Loan (Trustees) Act, 1915. The Act of 1915 expressly authorised trustees to invest in securities issued under the War Loan Act, 1915, and contained a provision, similar to that in the Act of 1939, relieving trustees from liability for any loss occasioned by such investment; but it did not enable trustees to invest in such securities, if the trust instrument expressly prevented them from doing so or to dispense with the consent of any person whose consent was required by the trust instrument. There were no provisions in the Act of 1915 corresponding to those contained in section 4 (3) of the Act of 1939.

J. P. L. R.

Faculty for erection of columbarium in connection with cremation—disused burial grounds.—A case of some importance on disused burial grounds is *Re St. John, Hampstead*, [1939] P. 281, in the consistory Court of London. A petition for a faculty to erect on a small area of an additional burial ground consecrated for that purpose a columbarium for the purpose of receiving urns containing the ashes of cremated persons was lodged with the consistory Court. The ground, though not subject to a closing order under the Disused Burial Grounds Act, 1884, which had been made in respect of other parts of the burial ground, was not suitable for interments. The petition was refused by the learned Chancellor (Mr. F. H. L. Errington) on the ground that he had no jurisdiction. He held first that such a columbarium was not in the same category as a private vault which could be erected if a faculty was granted, nor was the deposit of such urns a burial or interment in respect of which a burial service could be read; unlike an ordinary burial or interment of ashes for which the committal portion of the burial service is generally and legally read: *Re Dixon*, [1892] P. 386. As it was not a burial or interment it was not an extension of the burial ground perpendicularly and, therefore, it was a question whether it was authorised within the Disused Burial Grounds Act. He held, secondly, that it was not an authorised purpose within the Act and the fact that the ground was not actually the subject of a closing order did not prevent it from being a disused burial ground. The decision was based on *Re Ponsford and Newport District School Board*, [1894] 1 Ch. 454. There a cemetery company sold part of land which was used for burials and it was held that the part sold, which had been separated from the rest and never used, was a disused burial

ground and could not be built upon; it was "a piece of ground set apart for interments in which interments have or have not taken place, whether it has been partially or wholly closed under any statute or Order in Council, or has become otherwise disused": *per* Kay, L.J., at p. 467. The learned Chancellor also referred to *L. C. C. v. Greenwich Corpn.*, [1929] 1 Ch. 305, where it was held that a piece of land unused for burials and forming part of a burial ground which was still partly used was a disused burial ground. The learned Chancellor distinguished the decision of the Dean of Arches in *Corke v. Rainger*, [1912] P. 69, on the ground that the land there had not been consecrated as a burial ground.

It should be added that the learned Chancellor pointed out that a closing order does not prevent the burial of cremated remains (*Re Kerr*, [1894] P. 284), and indicated that he would be willing to consider a petition for provision to be made in the burial ground for placing tablets commemorative of such burials.

STRANGE COMPENSATION.

By a Solicitor.

It will be assumed for the purposes of the following remarks that the reader has perused either the article by Mr. Rogers in the September issue of *The Conveyancer* on the Compensation (Defence) Act, 1939, or the Act itself. It is therefore not proposed to deal generally with the provisions of the Act but only to examine certain of those provisions in order to determine the manner in which the Act operates, and compensation is payable, in connection with the "taking of possession of land" or "doing of works on land".

TAKING OF POSSESSION.

(1) *Running Compensation.*

It is common knowledge that no compensation is payable for loss of profits of any business, trade or profession conducted upon premises of which possession is taken by the Crown.

Under section 2 (1) (a) the occupier who is dispossessed is to be compensated in accordance with a formula which bears a close resemblance to the formula adopted in the Rating and Valuation Act, 1925. The amount payable is the rent which might reasonably be expected to be paid by a tenant who is liable to pay all tenant's rates and taxes and insurance and to discharge the expenses of all repairs and other items necessary to maintain the property in such a condition as to command that rent. Now such a formula may be quite satisfactory if the tenant is in fact under such liabilities. But no consideration appears to have been given to the case of the tenant who pays an inclusive rent and/or is not responsible for repairs and/or insurance. It will be sufficient if we deal with the case of the tenant who is not responsible for repairs and pays an inclusive rent. What is the position here?

(a) *Rates.*—The hypothetical tenant is presumed to be responsible for rates (*vide supra*). Therefore, if the inclusive rent is £500 and the rates amount to £150 the tenant will be the poorer by £150 per year when the Government take over the property (subject to the remarks below under "Loss of Profits"). Further, the practice, in cases where the Government requisition premises, is for the rating authority to adjust with the Treasury

the rating liability, no demand being made upon the owner or occupier (a). Accordingly, the landlord will pay no rates in respect of the property whilst it is occupied by or on behalf of the Government. The landlord will be the richer to the extent to which the tenant is the poorer! Strange compensation indeed.

(b) *Repairs and Insurance*.—In the case above taken we have seen that the tenant's compensation is already £150 short of the amount which he is liable to pay to his landlord. But a proper allowance for repairs and insurance remains to be deducted. Perhaps £50 per year might be a reasonable deduction for these items. If so the tenant will still be fortunate enough to receive from the Government £300 per year, although he must, of course, pay to the landlord £500. Although the rent which the Government will pay while occupying the property is based on the assumption that the tenant will be responsible for repairing the property it must not be supposed that the Government, as the actual tenant, will conform to the standard which it has laid down for the hypothetical tenant when fixing the rent which is to be paid by such tenant. On the contrary the Crown will not be responsible for fair wear and tear (section 2 (1) (b) as read with section 17). The Crown will be responsible for any actual damage, beyond fair wear and tear (section 2 (1) (b)); but if the Crown remains in occupation for a substantial period it is obvious that the property will require some attention for which either the landlord or the tenant must pay, since the Government will not be liable to do so, unless actual damage has been done to the property (beyond fair wear and tear).

(2) *Damage*.

Assuming that damage is done to the property compensation is to be paid. Is it to be paid to the right person? Not necessarily. It is payable to the "owner". The owner is the person in receipt of the rack rent, or who would be in receipt of the rack rent if the property were let at a rack rent (section 17). Therefore, if the occupying tenant holds the property under a full repairing lease at a rack rent, this "upside down" Act, pursuing its curious policy, awards compensation for the damage to the landlord! As the Act contains no provision which requires the landlord to expend the compensation money in the making good of the damage

(a) On October 10, 1939, Captain Crookshank, in reply to a question in the House, stated that the Government proposed to make appropriate grants to the local authorities concerned in cases where rates had ceased to be payable consequent upon the requisitioning of rateable property.

or in payment of the expenses incurred by the tenant in doing so, there appears to be nothing to prevent the landlord from accepting and retaining the boon thus conferred upon him. Moreover, as the tenant is liable to make good the damage, there is no reason why the landlord should not add to the burdens of the tenant by requiring him to do so. It is useless for the tenant to plead that the lease was "frustrated". The Courts have held otherwise: see *Matthey v. Curling*, [1922] 2 A. C. 180; *Whitehall Court, Ltd. v. Ettlinger*, [1920] 1 K. B. 680; *Redmond v. Dainton*, [1920] 2 K. B. 257; not to mention *Paradine v. Jane*, Aleyn 26. There seems to be no legal principle which would compel the landlord to hand over to the tenant the bonus received by him from a grateful Government. Or will it be received by the landlord after all? The playful draftsman of the Act leaves this matter in doubt. We have not exhausted our exhibits of curiosities contained in the Act. By section 12 (2) it is provided that no compensation is payable in respect of (*inter alia*) any damage to property if and so far as that person has become entitled, apart from the Act, to recover any sum by way of damages or indemnity in respect of that damage. Now, if the tenant has covenanted to keep the property in repair (*even with an exception of fair wear and tear*), and damage is done to the property, it would seem clear, on the authority of the cases last cited and the more recent case of *Taylor v. Webb*, [1937] 2 K. B. 283, that the responsibility for making good any damage done by the Crown whilst possession is held on behalf of the Crown rests upon the tenant. When the Crown goes out and would otherwise be liable to make compensation for the damage done, it may be urged that the tenant is liable in damages in respect of his failure to keep the premises in repair. If it be the case that the tenant is entitled to plead impossibility, which is not certain, that plea is only an answer for a short period (see *Matthey v. Curling*, *supra*). It cannot be contended that the tenant is unable, within a reasonable period after the giving up by the Crown of the property, to repair the property: so that the tenant must suffer in any event!

Even assuming that the tenant *has* a reasonable period within which to make good the damage and is thus not liable in damages at the material date (*i.e.*, when the Crown gives up possession) there is still the further question whether the tenant's liability to repair within a reasonable period (or to pay damages in case of default) is an "indemnity" within the meaning of section 12 (2). It is thought that as the landlord must show that at the material date he *had become* entitled to a sum by way of indemnity, he will not be precluded from recovering compensation under the Act under that

branch of the section. As to the question of the liability of the tenant to pay a sum by way of damages in respect of his failure to keep the premises in repair, it may be remembered that in *Matthey v. Curling*, [1922] 2 A. C. 180, where possession of a property was taken under the Defence of the Realm Regulations and retained until the lease expired, the lessee was held to be liable under his covenant to insure and to rebuild, in spite of the fact that he was not in possession when the lease expired, (the property having been destroyed by fire). Lord Buckmaster said: "He has bound himself to do these definite acts, and it is no excuse that circumstances which he could not control have happened and have prevented his compliance." But it would appear from the *obiter dicta* that their Lordships in that case considered that the lessor would be bound to afford to the lessee facilities for entering upon the land and erecting a new house after the expiry of the lease, unless he was prepared to forgo his right to enforce the covenant to rebuild. Therefore, it would seem that section 12 would not enable the Crown to refuse to pay compensation to the landlord for damage, other than fair wear and tear (for which no compensation is payable under the Act). Such a point should not have been left in doubt. It seems probable that Parliament had not given consideration to the question. The exception from the operation of section 12 of liability in damages in respect of a breach of covenant to repair would not, however, have produced a logical result unless accompanied by a provision in section 2 for payment by the lessor to the lessee out of the compensation payable to the lessor of an amount equal to the sum properly expended by the lessee, pursuant to the covenant to repair, in making good the damage done by the Crown.

(c) *Fair Wear and Tear*.—We have not yet considered closely the position of the tenant who covenants to keep the premises in repair "fair wear and tear excepted". The decision in *Taylor v. Webb*, *supra*, has made it clear that such a tenant is not liable in respect of any works, which are necessary in order to prevent further damage flowing from an original want of repair, e.g., by patching up a roof which is leaking owing to want of repair; but the same decision has also brought into prominence the fact that the exception does not extend to acts of God, or other abnormal occurrences such as storm, tempests, acts of King's enemies and the like. So far as "war damage" is concerned the tenant is protected by the Landlord and Tenant (War Damage) Act, 1939; but there is no such protection in respect of damage done by the Crown whilst in possession of the property. It would therefore seem that if actual damage is so done, the fair wear and tear tenant is in no

better plight than a full repairing tenant. (The term actual damage is used here because the Crown is not responsible for fair wear and tear.) There is, however, an important practical distinction between the respective significations of this term in the Act and in a lease. In the Act it means such wear and tear as might have been expected to occur but for the fact that possession of the property was taken by the Crown. In other words, if the wear and tear to which the property is subjected during possession by the Crown is heavier than the wear and tear which would normally have resulted in the course of user of the property in the manner in which it was being or (possibly) might lawfully have been used by the tenant, then the Crown will pay compensation in respect of the additional damage caused by such heavier user. The fair wear and tear tenant will thus be responsible for this additional damage caused by the Crown; but, as we have seen, the compensation will be paid by the Crown to the landlord!

Neither the full repairing tenant nor the fair wear and tear tenant would appear to derive any benefit in this connection from the rule that a landlord cannot recover under a covenant to keep, put or leave premises in repair a sum in excess of the amount by which the value of the reversion is diminished: see section 18 (1) of the Landlord and Tenant Act, 1927. As will be seen from the express words of that sub-section the sole test is the extent to which the value of the reversion "is diminished owing to the breach". It is submitted that it would be useless for the tenant to urge the fact that the landlord would receive compensation from a third party (albeit the Crown) in support of the contention that the value of the reversion had not been diminished by the breach of the covenant to keep or put the property in repair. That question is one which is determined by the physical condition of the property.

It *may* be that in a case where it was clear that the Crown would pay compensation for the damage, or had paid such compensation, the tenant could obtain relief from forfeiture of the lease. But it does not follow that the landlord will take steps to enforce a forfeiture. He may prefer to sue for damages. Moreover, if the lease contains the usual modern clause under which the landlord reserves a right of entry upon the premises for the purpose of putting the premises in repair in the event of default by the tenant, coupled with a provision that the expenses of any such repairs are to be repaid by the tenant, it is not clear that the tenant would have any defence to a claim for the repayment of any such expenses incurred by the landlord, even if the Crown had in effect paid for the repairs (by way of compensation)!

THE DOING OF WORK ON LAND.

The Crown may not only take possession of land but may without taking possession do works on land. Or, of course, the Crown may both take possession and do works on the land.

(a) Work Done but Possession not Taken.

It is recognised that the doing of works on land (which includes buildings and erections thereon) may result in diminution of the annual value. The annual value of the property is to be taken on a rental basis. The occupier will therefore receive no compensation in respect of any loss of profits which he will suffer by reason of interference with the conduct of his business. Here, as in the case of the taking possession of land, compensation is payable, on the basis indicated, during the execution of the works and this running compensation is payable to the person for the time being entitled to occupy the property until the Crown restores the property to its former condition or gives notice of intention to pay a lump sum in discharge of compensation (see section 3 (3) and (9)). The running compensation is then brought to an end, either by restoration of the premises or by the arrival of the date specified in the notice as the date on which the Crown proposes to pay the lump sum. It will be observed that as long as the person entitled to occupation is getting compensation the question of other interests does not arise. But if the Crown does not restore the property to its former condition it has been recognised by the Legislature that it would be unjust to leave the property in its altered condition without making compensation if the annual value of the property has been lessened. But how does the Legislature set about this problem? Not by providing the person who is liable to restore the property to its former condition with the necessary sum; but by compensating each person who has an interest in the property in respect of the diminution of value of his interest. The amount payable is a sum equal to the depreciation in value of the interest or estate affected. Here, again, it seems impossible to suggest that the result is to absolve the tenant from any obligation to restore the property to its former condition if he has covenanted to yield it up in the same condition as at the date of the demise, or (in the case of damage) in good repair. Even if it could possibly be so held it is hardly reasonable that the Legislature should leave the position so doubtful.

With regard to diminution in annual value two points should be noted :—

- (i) No account is to be taken of loss of pleasure or amenity : section 3 (7).

- (ii) It is to be assumed that the premises cannot be restored to their former condition : section 3 (6).

(b) *Taking Possession of and Doing Works on Land.*

If the Crown not only takes possession of property but also does works upon it, what is the position?

It is provided by section 3 (8) that no compensation under that section (which relates only to the doing of works) shall be payable in respect of any *period* for which possession of the land is taken. Whilst this provision seems at first a little difficult to follow its meaning is made reasonably clear by a comparison of the provisions of the sub-sections dealing with compensation for the doing of works and in respect of the taking of possession respectively. The intention appears to be to prevent claims being set up both under sections 2 and 3 for compensation in respect of the period during which the Crown is in possession and doing works upon the property, *i.e.* :—

- (1) Rental value estimated in accordance with section 2 (1) (a) during the period of possession, and *in addition* during the same period
- (2) Diminution of annual value under section 3 (2). *I.e.*, the running loss from day to day—not the depreciation of the capital value—owing to the execution of the works.

It was suggested in a contemporary that the result of section 3 (8) is that “no compensation can be paid in respect of the work done, except in so far as that may be covered by the general provisions of section 2. That is to say, in the event of work being done on land which has been taken, no ‘diminution of the annual value ascribable to the doing of the work’ (section 3 (2)) or *lessening of the value of any estate or interest thereby* (section 3 (4)) can, as such, form the basis of compensation, but only in so far as they can be brought within the provisions for compensation contained in section 2”.

Now it is quite true, as indicated above, that the person in or on whose property works are executed by the Crown cannot have both meal and malt. That is, he cannot receive what is assumed to be a proper rent for the whole of the property during the period of possession, and also *running* compensation during the same period in respect of the diminution of value during that period owing to the execution or existence of the works in or on the property. (No doubt he *ought* to be paid a proper sum for any disturbance and expense to which he is put; but the Legislature has not thought fit to award compensation in respect of such items

(except expenses incurred by the direction of the Crown). In any case that is another matter.) But there would seem to be no possible justification for the view that compensation will not be payable in respect of the *permanent* depreciation of value of any estate or interest in the property by reason of the doing of works on the land, as suggested in the passage quoted above. Section 3 (8), which declares that no compensation is payable under that section in respect of any period for which possession is taken, has no connection with the lessening of annual value at the *end* of the period of possession. Section 3 (4) of the Act provides for compensation if, *at the expiration of the period* in respect of which the running compensation under section 3 (1) is payable, the value of any estate or interest in the land is less than it would be but for the doing of the work (b).

Therefore, where possession is taken and work done, all persons whose interests are depreciated in value owing to the leaving of the property in its altered condition will be entitled to receive a lump sum by way of compensation under section 3, on the expiry of the notice to be served by the Crown as above mentioned.

Under section 2 (1) (b) compensation is payable at the end of the period of possession in respect of damage which has occurred during the period of possession. Now, if possession is taken and work done it can well be imagined that difficulties will arise in determining whether certain things which have been done on the land constitute damage in respect of which compensation is to be paid under section 2 to the person entitled to receive the rack rent of the land upon vacation of the land by the Crown. The importance of the point is that each person entitled to any estate or interest is entitled to compensation in respect of the permanent depreciation of value of such estate or interest by reason of the doing of works on land.

Therefore, it becomes material to consider what constitutes the doing of works on land, bearing in mind the fact that no compensation is payable in respect of any measures taken to avoid the spreading of the consequences of damage caused by war operations, *i.e.*, enemy action or "action taken in combating an enemy or in repelling an *imagined* (c) attack by an enemy". No exhaustive definition of "the doing of works" is attempted by the Act; but it is stated that the doing of works includes:—

(b) It is understood that the writer of the article in the contemporary above referred to has since agreed with the view here expressed.

(c) Presumably this means combative action taken in the mistaken belief that an attack is being made by an enemy. It seems impossible to repel an attack which is non-existent.

- (a) The demolition, pulling down, destruction or rendering useless of anything placed in, on or over land;
- (b) The maintenance of any work or thing in, on or over land;
- (c) The removal from the land of anything so placed, demolished or pulled down in the exercise of emergency powers: section 17 (2).

If interior walls are pulled down, or fixtures of a permanent character are destroyed, it would be difficult to deny that such destruction constitutes damage within the meaning of section 2 of the Act.

It is submitted that the answer to the problem is as follows. If the Crown takes possession and executes works on the land, doing damage in the course of the execution of the works, compensation is payable under section 3. At least, it seems clear that compensation is payable under that section only if the damage constitutes part of the works done. But if in carrying out the work unnecessary damage is done, *e.g.*, by negligence, it is a nice question whether compensation should be paid in respect of that damage under section 2 or section 3. Compensation is payable under the latter section *only* in respect of the lessening of the annual value by reason of the doing of the work.

LOSS OF PROFITS.

The Act makes no provision for the award of loss of profits. The running compensation must be calculated on the basis mentioned in section 2 if possession is taken, or on the basis of diminution of annual value if work is done.

Assume, however, that possession is taken of shop premises which are held on lease at an inclusive rent of £100 per annum. If the rent paid is one which a tenant "might reasonably be expected" to pay, then the running compensation must be less than £100 per annum, since a reasonable allowance must be made in respect of repairs, rates and taxes and insurance. But in a written reply to a Parliamentary question the Financial Secretary to the Treasury has stated that in assessing the sum to be paid in the case of an hotel profits derivable from the conduct of the premises as an hotel may be taken into account (see *The Times*, Nov. 15, 1939, p. 5). As no differentiation is made by the Act between hotels and other premises the result should *apparently* be as follows. A pays an inclusive rent of £200 per annum for premises at which he conducts the business of a garage. He makes a net profit of £250 per annum (*i.e.*, after deducting all expenses). It is clear that he cannot expect that a full repairing tenant liable

for rates, taxes and insurance will pay a rent of £450 for many reasons of which three may be mentioned :—

- (a) A suitable deduction must be made in respect of rates, taxes, insurance and repair.
- (b) A further deduction must be made in respect of the value of the services of A in connection with the business.
- (c) A reasonable margin must be allowed in case profits are not fully maintained or expenses increased.

Nevertheless, the rent which such a tenant would expect to pay will probably lie somewhere between the original rent (£200) and £450. Possibly the appropriate figure may be £300. In that case the position of the inclusive tenant is entirely altered. It is not unreasonable to assume that £100 per annum will be the appropriate deduction for rates, taxes, insurance and repairs, leaving the net rent of £200.

If the inclusive rent of £200 is taken and £100 is to be deducted it will be seen that the tenant, continuing, as he must, to pay the full rent of £200, will receive from the Government compensation at the rate of £100 per annum. As the refund of rates will be made to the landlord, and the tenant will receive no compensation in respect of repairs (for which he will, in general, not be responsible) the net loss to the tenant will be at the rate of £100 per annum.

But if it can be shown that the inclusive rent is low, and that a tenant responsible for rates, taxes, insurances and repairs might reasonably be expected to pay a rent of £200, the net result will be that the tenant will suffer no loss since he will both pay and receive £200 per annum. At the moment of writing it is not clear that those responsible for the administration of the Act have received instructions to give effect to the statement made by the Financial Secretary, as above mentioned; and therefore it cannot be said with certainty that matters will work out in the manner indicated. It would, however, seem that it is the duty of solicitors and valuers to put forward a claim for compensation on the above basis (*d*).

(d) It is now understood that the official view is that the compensatory rent is to be arrived at "as a result of various considerations including the profits to be made"; and that "these profits would of course be judged to a large extent from details of profits which had been made in the past, necessarily adjusted to the probability of these profits continuing during the period of Crown occupation, if requisitioning had not taken place". It is clear that the hypothetical tenant must be presumed to have been ignorant of the proposed requisitioning by the Crown of the property. It is thought that the hypothetical tenant must be deemed to have taken into account the imminence or (as the case may be) the existence of war, but it is provided by the Act that "appreciation of values due to the emergency" is not to be taken into account in computing the hypothetical rent: proviso (i) to s. 2 (1).

At the same time, the position thus arising is hardly logical. For if the tenant is unfortunate enough to have been running his business at little or no profit he must pay the full inclusive rent and receive a smaller one, whilst the tenant whose business had been, and was likely to continue to be, profitable will probably receive from the Government more than he pays by way of rent. And yet it was stated previously in Parliament that no compensation would be awarded for loss of profits! In many quarters the view has been expressed that the Act should be altered. To this view the present writer heartily subscribes. Meanwhile practitioners must take such measures as are possible to counteract the unfortunate results of the Act as it stands. To existing tenants no measure of relief can be afforded. But intending tenants can and should be safeguarded by the insertion of certain provisions in the proposed tenancy agreement.

PRACTICE NOTES.

It is not suggested that the clauses which follow will necessarily meet all cases, and it will be appreciated that they have been framed somewhat hurriedly in order to meet a pressing necessity. They should be taken merely as indicating some of the more important matters which appear to be likely to call for consideration, being rather the first word than the last word upon the matter. Indeed any practical suggestions directed either to the improvement of the clauses or to the necessity for additional clauses dealing with other matters arising under the Act will be welcome. Bowed, as all practitioners are, under the ceaseless storm of legislation and Orders in Council, makeshift precedents must of necessity take their place alongside makeshift statutes. It can only be hoped that the remedy afforded by the following precedents will not prove, in practice, to be worse than the disease, if the Legislature decides to amend retrospectively the Compensation (Defence) Act without considering the position of parties to contracts made between the commencement of the Act and the commencement of the amending Act!

A.—If the rent is inclusive it will be necessary to provide for the transfer to the tenant of the benefit of any concession in respect of rates which is obtainable by the landlord during the period of occupation of the premises (or some part thereof) by the Crown or any other authority (*e.g.*, the local authority under the powers contained in the Civil Defence Act, 1939). The reason is given above. Quite apart from the point last mentioned it is not perhaps

too widely appreciated that if premises are held at an inclusive rent and are left vacant and unused by the tenant for some unexpected reason, the landlord can obtain the void allowance and appears to be under no legal obligation to make any concession to the tenant or to pay over any part of the void allowance to the tenant when it is received. The form below therefore covers both void allowance and the allowance made to the landlord when the property is occupied under statutory powers.

Where rent inclusive—Proviso following covenant by landlord to pay rates, taxes and outgoings.

Provided that if owing to the fact that the property hereby let or any part thereof is unoccupied or is occupied by or on behalf of a competent authority in the exercise of statutory powers any rate or rates otherwise payable in respect thereof shall not be payable during any period of the term hereby granted, then the rent payable hereunder during such period (hereinafter called the said period) shall be reduced by an amount equal to the amount of such rate or rates which would have been payable in respect of the said period if the property or (as the case may be) such part had been occupied by the tenant during the said period. Provided further that if such part shall not be separately rated a fair and just apportionment shall be made according to the extent of such part and the nature of the user by the tenant of such part and all necessary adjustments shall be made between the landlord and the tenant in order to give effect to the foregoing provisions (*mutatis mutandis*) in relation to such part.

B.—Cesser or abatement of rent in case of dispossession or interference owing to the exercise of compulsory powers also requires consideration. The compensation for the period of occupation will be payable to the tenant, and therefore if the rent is to cease, provision must be made for the landlord to receive any compensation paid to the tenant by the authority, up to the amount of the rent. It is submitted that the risk that the tenant will not be able to occupy the property for which he is paying rent is not a risk which a tenant can normally be expected to undertake. Rather is it the position that the landlord only expects to obtain rent so long as the tenant can enjoy the use of the property. In no case is it clear that the compensation will be equal to the rent, and in the case of a non-repairing lease at an inclusive rent it is improbable that it will be so. Moreover, the practical result of the requisitioning for an indefinite period

of the demised premises must be taken into account. If the premises are used for purposes of trade or business the tenant will be compelled to find some other place in which to conduct his activities. If the premises which are requisitioned are held for an unexpired term of (say) six or more years, and possession is retained by the Crown for two or three years, it would surely be unreasonable that the tenant should be required to take over the lease again when the Crown vacates. Yet it is clear that the tenant must do so unless the lease contains a stipulation to the contrary : *Matthey v. Curling, supra*. The form below therefore gives the tenant the right to determine the tenancy if the possession of or interference with user of the premises continues for a certain period. With regard to interference as distinct from the taking of possession it is appreciated that some modification of the form set out below may be required in certain cases. The landlord may point out that the interference may be so slight as not to interfere materially with the conduct of the trade or business carried on by the tenant. In that case it may be possible to agree that the right of determination shall not be exercisable in that event. But if such a modification is agreed it will be desirable to explain to the intending tenant that a dispute may arise as to whether the interference is or is not such as materially to affect the conduct of his trade or business. An arbitration clause can, of course, be inserted ; but arbitration is expensive and does not always achieve finality.

The clause which follows can no doubt be improved upon. It has been devised somewhat hurriedly in order to show the type of clause required rather than to supply the exact form of words to be employed. It may, nevertheless, be of use as a rough draft clause which can be altered suitably to meet the circumstances of any particular case. For obvious reasons it is convenient to incorporate the desired provisions in the usual clause dealing with cesser of rent in case of damage by fire. It should be explained that provision has also been made for cesser or abatement of rent in case of war damage because there is no immediate and automatic cesser or abatement of rent when war damage occurs. As to damage which does not render the premises *as a whole* unfit, it is important to note that the Landlord and Tenant (War Damage) Act, 1939, does *not* provide for any abatement of rent. The Committee on whose report that Act is based appear to have appreciated that the tenant would remain responsible for the full rent but apparently considered that if a state of war existed there was no hardship in this so long as the premises remained habitable : see Command 5934 of 1939 H.M. Stationery Office, at pp. 4 and 5.

Opinions may differ as to whether premises are in fact habitable after war damage has occurred. It will be seen from the provisions contained in the last-mentioned Act that this fact has been appreciated. If substantial war damage has occurred, and it is ultimately held that the premises are not "unfit" within the meaning of the Act, the tenant will be unable to disclaim the lease. Further, the only right which the tenant has under the Act (if the premises are rendered unfit by war damage) is to disclaim the lease. Although he may not desire *fully* to repair the damage, he may not wish to disclaim the lease. It would seem to be equitable in such a case that the tenant should be entitled to an abatement of the rent. It is for this reason that war damage has been mentioned in the following form as one of the occurrences which will entitle the tenant to cease payment of the rent, or a fair proportion thereof. It will be noted that the power of determination of the lease is *not* exercisable if the war damage is such as to render the property "unfit" within the meaning of the Landlord and Tenant (War Damage) Act, 1939. The point is that it is impossible to "contract out" of the provisions of that Act. If the tenant purports to disclaim the lease under the Act the landlord has the right to serve a counter-notice. The effect of such a counter-notice is that the landlord must within a reasonable time make good the war damage and the tenant must retain the property (see the article on that Act in *The Conveyancer*, September, 1939). An absolute power of determination by the tenant might well be held to amount to a negation of the landlord's right to serve such a counter-notice under the Act. Moreover the tenant should presumably be content to retain the lease if the damage is made good by the landlord within a reasonable time. The point here taken does not appear to apply to a provision for cesser of rent in case of war damage. Such a provision does not appear to involve a negation of the provisions of the Act. It would appear merely to give additional rights or benefits to the tenant.

The form suggested is as follows :—

Cesser or abatement of rent.

(1) The rent hereby reserved or a fair and just proportion thereof shall be suspended and cease to be payable during the subsistence of any of the following occurrences :—

- (a) War damage as defined by the Landlord and Tenant (War Damage) Act, 1939 (hereinafter called "war damage"), damage by or in consequence of fire or inevitable accident rendering the said premises or any part thereof unfit for occupation or use or interfering with access thereto; or

(b) Dispossession or interference with the tenant's enjoyment of the said premises or any part thereof by reason of the exercise of any statutory power.

(2) Provided nevertheless that any compensation or other moneys payable by statute to the tenant by reason of the exercise of any statutory power and attributable to any period of dispossession or interference as aforesaid (as distinct from compensation for damage or other matters) shall be held in trust for the landlord to the extent to which the rent is suspended under sub-clause (1) of this clause.

(3) If within [three] calendar months after any such occurrence as aforesaid (except war damage rendering the demised premises unfit within the meaning of the Landlord and Tenant (War Damage) Act, 1939) the said premises shall not be as fully available to the tenant and as fit for occupation, use and access as the same were before such occurrence, or if any such damage as aforesaid shall not have been fully made good the tenant may (at the tenant's option) at any time thereafter determine the tenancy hereby created forthwith by written notice to the landlord, but such determination shall be without prejudice to any claim by either party against the other in respect of any antecedent breach of his obligations hereunder.

(4) For the purposes of the foregoing provisions all rent, whether paid or payable in advance or not, shall be apportioned on a time basis from day to day, any appropriate payment by or repayment to the tenant being made accordingly (e).

C.—If possession of the property is taken by the Crown all compensation payable in respect of damage to the property is payable to the person entitled to the rack rent (*i.e.*, in general, to the landlord). Therefore, the rack rental tenant who is responsible for the repair of the property must be protected by a suitable qualification of the repairing covenant. The form suggested is as follows :—

Qualification of repairing covenant in respect of damage done during occupation under compulsory powers.

Provided that the Tenant shall not be liable to make good

(e) It will be remembered that under the Apportionment Act, 1870, rent accruing due is apportionable. Rent accrued due is not apportionable under that Act. See *Ellis v. Rowbotham*, [1900] 1 Q. B. 744. Accordingly unless special provision is made a tenant who has paid rent in advance to September 29, 1940, and determines the tenancy on (say) June 30, 1939, will be unable to recover the "overpaid" rent unless provision is made for readjustment on the lines of sub-clause (3) above: see *Ellis v. Rowbotham*, *supra*.

any damage [or, wear and tear (f)] [other than fair wear and tear (g)] which shall occur to the demised premises or any part thereof during any period for which possession of the demised premises or of such part (as the case may be) is retained by any competent authority in the exercise of any compulsory power or which shall be caused by any act done by or on behalf of any such authority in the exercise of any such power.

(f) These words should be inserted if the tenant is not responsible for fair wear and tear. The "fair wear and tear" tenant will be responsible for damage done by the Crown or other authority: *Taylor v. Webb*, [1937] 2 K. B. 283, as read with *Paradine v. Jane*, Aleyn 26, and *Matthey v. Curling*, [1922] 2 A. C. 180.

(g) If the tenant is responsible for repairs it is likely that there will be much contention concerning the insertion of these words. No compensation is to be paid by the Crown in respect of fair wear and tear (although the Crown has the use of the property): Compensation (Defence) Act, 1939, s. 2 (1) (b). On the one hand the landlord will contend that the tenant must take the risk, as he, the landlord, will receive no compensation in respect of fair wear and tear. On the other hand the tenant will urge that, if he is deprived of the use of the property, it is inequitable that he should be responsible even for fair wear and tear arising from the use by the Crown of the property. The problem is one of which there is no real solution. The compensation is fixed on the basis that the *tenant* is responsible for all repairs, which includes repairs necessitated by fair wear and tear. But although the Crown is itself the hypothetical tenant for whom the rent has to be fixed, it does not, as tenant, conform to the standard which it has taken for the purpose of assessing compensation. The Legislature has made the Crown responsible for compensation as if the owner had a tenant who was responsible for fair wear and tear. Actually the Crown itself will be the tenant but will not be responsible for fair wear and tear! The writer does not overlook the fact that the Crown will be responsible for wear and tear in excess of that which "might have been expected to occur" if the Crown had not taken possession of the property, *i.e.*, any additional wear and tear arising from the particular user to which the property is put by the Crown. The result is merely to alleviate, and not to eliminate, hardship.

PROPERTY AND THE WAR.

By E. O. WALFORD, LL.D., Solicitor.

I.

INTRODUCTORY.

It is proposed in this and a further article to consider some effects of the war upon owners or contractors for the purchase or sale of real or leasehold property. It may be said at once that, in general, the outbreak of war has no effect whatever upon freehold or leasehold interests, or the relative rights of landlords and tenants or their respective obligations, where the interested parties are not alien enemies.

But it is not surprising to find that the results produced by war have been the subject of a great deal of litigation. Thus damage by aerial bombardment, the requisitioning of property by the Government, the issue of orders requiring the cessation of activities by parties who have agreed to perform certain services or to supply certain goods, and the physical impracticability or impossibility of performing particular contracts are only a few instances of war events or occurrences which have troubled the Courts from time to time. Here we are concerned only with decisions which relate to or have some bearing upon real or leasehold property. Moreover, it is not proposed to consider in detail (except in connection with the position of aliens) the effect of the Emergency Statutes recently passed. These have already been summarised in the September issue of *The Conveyancer*, and an article showing the peculiar operation of the Compensation (Defence) Act, 1939, will be found in the present issue, *ante*, p. 117.

First, it is proposed to deal with leasehold interests. Neither the outbreak of war nor the occurrence of damage or requisitioning by military, naval, executive or administrative authority of property operated at common law to put an end to any lease or tenancy which was then in existence. Moreover, apart from statutory provisions, *e.g.*, the Landlord and Tenant (War Damage) Act, 1939, the tenant, in accordance with well-settled law, remains even now fully responsible for the due and punctual performance of his obligations under his contract of tenancy or lease. Indeed

a consideration of the case-law will almost certainly create the impression that in relation to the doctrine of impossibility of performance discrimination has been made between commercial contracts and leases or tenancy agreements.

In the Report of the Committee on Liability for War Damage (Command 6100 of 1939) reference is made to the Buckmaster Committee's Report (Command 8975 of 1918). The statement made by the Buckmaster Committee contained the following passages :—

(1) "*Prima facie* if a man binds himself by contract unconditionally to do that which turns out to be impossible he will be held to his bargain and have to pay damages for his failure to perform." As we shall see, little, if any, departure from this rigid rule of common law has been made in the case of leases.

(2) "If, however, the impossibility arises from a cause that neither party can reasonably have contemplated when the contract was made, and as to which the terms of the contract make no provision, a man will not be so bound; the matter being unforeseen, he is not taken to have promised unconditionally, nor, for the same reason, has he stipulated for any condition of excuse. . . . Impossibility for this purpose means commercial impossibility."

Examples of the application of the doctrine thus expressed are not wanting in the field of commercial contract. Indeed, it may be doubted whether another proposition laid down in the Buckmaster Report has not been overlooked in some of the decisions concerning "commercial ventures", namely, that "mere increased cost of performance, unless to an enormous and extravagant extent, does not make it impossible. A man is not prevented from performing by economic unprofitableness, unless the pecuniary burden is so great as to approximate to physical prevention". How a pecuniary liability can amount to *physical* prevention the Committee do not explain. But when we come to consider the "enormous and extravagant" expense to which the tenant was put in *Paradine v. Jane*, *infra*, we may well wonder how and when this modern doctrine of "commercial impossibility" came into existence, and why that kind of impossibility *appears* to have no place in the law of landlord and tenant.

Those who "learned their law" prior to the coronation cases were familiar with two distinct types of case exemplified by the leading (but contrasted) decisions of *Thornborow v. Whitacre* and *Taylor v. Caldwell*. It may be profitable to pause to consider briefly those cases, borrowing unashamedly from that excellent *magnum in parvo*, *Shirley's Leading Cases*.

(a) *Thornborow v. Whitacre* (1706), 2 Lord Raymond 1164.—
" 'Farmer Whitacre', said the cunning Thornborow, 'let us

strike a bargain. If I pay you a five-pound note down now, will you give me two rye corns next Monday, four on Monday week, eight on Monday fortnight, and so on—doubling it every Monday—for a year?’ Whitacre jumped at it; five pounds never were earned so easily. So the thing was settled. But when our yokel friend came to calculate how much rye he should have to deliver, he found that it came to more than was ever grown in all England. Thornborow, however, brought his action, and had the case not been compromised, would probably have succeeded; for the Court intimated that they thought the contract binding.”

On behalf of Whitacre “impossibility” was pleaded; but the Court ruled that it was impossible only in respect of the defendant’s ability.

The observation to be made on this case is that the doctrine of frustration or *supervening* impossibility of performance has no application to such cases. It would be impossible to assume that *both* parties had contracted on the assumption that it would be practicable to obtain in England the quantity of rye corns necessary to implement the contract. The probability was that Thornborow was well aware of that fact.

The Buckmaster Committee’s reference to a pecuniary burden “so great as to approximate to physical prevention” must be read with their other observation to the effect that if relief from the burden of a contract is given “it is because the Court holds that it was an implied term of the contract that it should be dissolved in the event *which has arisen* and created the impossibility”. In Thornborow’s case there had been no change in the circumstances.

With regard to contracts which are obviously impossible (*i.e.*, so obviously impossible that both parties must have known of such impossibility) the better opinion appears to be that such contracts are unenforceable (*i.e.*, give no right to damages) for the simple reason that neither party can have expected that the impossible would be performed: *Clifford v. Watts* (1870), L. R. 5 C. P., at p. 588.

(b) *Taylor v. Caldwell* (1863), 32 L. J. Q. B. 164.—“Caldwell agreed to let Taylor have the Surrey Gardens and Music Hall at Newington for four specified summer nights, on which Taylor proposed to entertain the British public with bands . . . and other festivities. Unfortunately, before these summer nights arrived, Caldwell’s premises were destroyed by an accidental fire. Taylor had been put to great expense in preparing for his entertainment, and he submitted that, as the contract was an absolute one. Caldwell must pay damages for the breach. It was held, however,

that the parties must be taken to have contracted on the basis of the continued existence of the premises, and as they had been burnt down without the fault of either party, both parties were excused."

If for destruction by "accidental fire" we substitute "incendiary bomb" we can transform this case at once into a war-time example of supervening impossibility of performance. The *Taylor v. Caldwell* decision undoubtedly made an inroad into the "sanctity" of contract. The common law rule was that supervening impossibility of performance was no bar to an action for damages. Thus, it was held to be no answer to an action for damages that goods agreed to be sold could not be obtained, or could only be obtained at a very exorbitant price: *Hale v. Rawson* (1858), 27 L. J. C. P. 189. Indeed, in this very case of *Taylor v. Caldwell* Blackburn, J., observed that where there was a contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents the performance of his contract had become unexpectedly burdensome or even impossible. But he then proceeded to consider the Roman law (under which it is clear beyond doubt that a contract which is impossible of performance is void), and said that where "the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing will excuse the performance. . . . There are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for fulfilment arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done". There, in the absence of any express or implied warranty that the thing shall exist, he thought that the contract was to be construed as subject to an implied condition that the parties are to be excused if, before breach, performance becomes impossible owing to the perishing of the thing, without default by the party who has undertaken the obligation. Whether Mr. Justice Blackburn appreciated the results which would ensue from the wide proposition which he thus enunciated may be doubted (a).

(a) It is not denied that there are earlier authorities to the effect that destruction of the subject-matter of a contract will avoid the contract; but *Taylor v. Caldwell* has generally been treated as the leading case in view of the wide form in which the frustration doctrine was stated by Blackburn, J.

So far as concerns the perishing of an "essential person" it has always been recognised by the common law that contracts for personal service are regarded as personal contracts which are determined by the death of the party whose services are required to be performed (*Robinson v. Davison* (1871), L. R. 6 Ex. 269); but the possibility of the discharge of the contract by the perishing of some essential "thing" opened up fresh fields and pastures new, particularly in connection with commercial obligations. It is not to be wondered at that business men were quick to seize upon this new proposition as a panacea for the many and varied evils which ensue from attempts to count chickens before they are hatched or even from laudable but misguided efforts to turn an honest penny. Whilst the moralist could only foresee disaster if the chickens did not arrive, or perished, the law was apparently able to improve the condition of the rash man who had made a promise which he could not perform. It mattered not that one party to the contract was able and willing to perform his part of the contract, and would suffer pecuniary loss in the event of non-performance by the other party. Even if that loss exceeded the damages which could normally be recovered in the event of a repudiation of the contract by the other party, not a penny would be paid to him if the "essential thing" had perished. The Judges who carried on the work begun by Blackburn, J., were careful to explain that they were unable to make a new contract for the parties, ignoring the fact that the introduction of an implied condition precedent (or subsequent) itself involved the implied introduction of an additional provision.

The extraordinary effect produced by this "frustration" or "supervening impossibility" doctrine has been referred to by the rather sinister name of "the guillotine". It might have been supposed that the aftermath of frustration would be *restitutio in integrum*. In later cases (which it would be out of place to discuss in detail here) the Judges were not prepared to adjust the position in this way. The maxim which they purported to adopt was that the loss lies where it falls. If the guillotine has fallen on the neck of A and removed his head (financially speaking!) far be it from the Court to say that he would have stipulated for compensation. One is invited to consider in what a predicament the Judges would be placed if they had to decide what should happen if A has paid to B a sum of £1,000 and B has been prevented, through no fault of his, from delivering to A goods to that value pursuant to contract. "It is impossible to adjust or ascertain the rights of the parties with exactitude. That being so, the law treats everything that has been done as validly done, but relieves the parties

of further responsibility under it": *per* Collins, M.R., in *Chandler v. Webster*, [1904] 1 K. B. 499. But is it quite correct to say that the law relieves the parties of further responsibility? It is not. In the same case it was held that as a certain sum was due to be paid under the contract by one of the parties before the contract was frustrated, he must pay that sum, although, as the contract was discharged, he could derive no benefit from the payment! Lord Shaw has expressed himself somewhat strongly upon these peculiar rules. "*Leave things alone: potior est conditio possidentis*. That maxim works well enough among tricksters, gamblers and thieves; let it be applied to circumstances of supervening mishap arising from causes outside the volition of the parties: under this application innocent loss may and must be endured by the one party, and unearned aggrandisement may and must be secured at his expense to the other party. That is part of the law of England": *Cantiare San Rocco v. Clyde Shipbuilding and Engineering Co.*, [1924] A. C. 226.

It is right to mention that a Government Committee which made its report last May recommended certain changes in the law, in accordance with the general principle that if either party has paid anything to the other party the amount paid is to be recoverable less any loss directly incurred by the payee for the purpose of performing the contract. Provision is proposed to be made when at the moment of frustration the contract has been partly performed and the part so performed is severable. In that case the principle just mentioned is to apply only to the unperformed part of the contract. (See Command 6009 of 1939, H.M. Stationery Office.)

The cases above mentioned are to be differentiated from contracts which are void *ab initio*. There the consideration has completely failed. If the contract is executory then even if it is illegal a party who has made a payment under it can recover it as "money had and received": *Tappenden v. Randall*, 2 B. & S. 467; *Taylor v. Bowers* (1876), 1 Q. B. D. 291; *Wilson v. Strugnell* (1881), 7 Q. B. D. 548.

LANDLORD AND TENANT.

The doctrine of frustration, as we have seen, is based on the assumption of an implied condition, or—as it was put in *Hirji Mulji v. Cheong, etc., Co.*, [1926] A. C. 507—frustration of the common object. In the case of commercial contracts full rein has been given to this doctrine, to the extent of avoiding contracts, upon the ground that sensible men would have said: "If that happens, of course, it is all over between us": see *per* Lord

Loreburn in *F. A. Tamplin Steamship Co., Ltd. v. Anglo-Mexican, etc., Co., Ltd.*, [1916] 2 A. C. 397.

But when we turn to the cases dealing with tenancies and leases we shall find that the wind of the common law is not tempered to the tenant. The old case of *Paradine v. Jane* (1647), Aleyn 26, is still the leading decision. In that case a distinction was taken between liabilities imposed by the law and those imposed by contract. "Where the law creates a duty or charge and the party is disabled to perform it, without any default in him, and hath no remedy over, there the law will excuse him." Although this may be true of the liability for waste and certain other obligations arising by law, a word of caution against the unqualified acceptance of this proposition may be uttered. "But when the party by his own contract creates a duty or charge upon himself he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract, and therefore if the lessee covenants to repair a house, though it be burned by lightning or thrown down by enemies, yet he ought to repair it." Not a word do we find in *Paradine v. Jane* concerning the discharge of the contract if the main part of the subject-matter of the lease is destroyed. On the contrary the lessee must make good the damage "if he may". Suppose that A holds a lease of a house for seven years, and is liable to keep and deliver up the house in good repair at the end of the term. In the last month of the term the house is destroyed by fire. A is under no covenant to insure and rebuild in case of fire, because the rent is fixed on the footing that he will not be liable for the fire insurance premium. The landlord has not agreed to insure, although he has done so during the term, except that by an oversight he has forgotten to insure during the last year of the term. Though the land remains, the essential subject-matter of the contract is the house, which has ceased to exist. But the lessee is not merely bound to continue the payment of the rent; he must rebuild the house although he never agreed to insure the house and had not impliedly undertaken to insure it. If *Paradine v. Jane* is to be the watchword in cases where the tenant alleges that there has been a "frustration" of the lease, it is clear that the lessee will have very uphill work. And so it has proved, as we shall see from the cases detailed below.

It cannot be said that the doctrine of frustration will not be applied to licences to use premises or parts of premises (even for several years), particularly where the licence for user is limited to some specific purpose. It is suggested that if owing to some unforeseen event it is completely impossible for the licensee to

use the premises for the limited purpose permitted by the licence, and such impossibility extends to the whole of the term of the licence, or appears to be likely to continue for an indefinite period, the Court will probably apply the doctrine of frustration. So far as concerns licences to use premises for a very short period, the cases of *Krell v. Henry*, [1903] 2 K. B. 740, and *Chandler v. Webster*, [1904] 1 K. B. 493, appear to furnish sufficient authority for this proposition.

But when we turn to licences for a lengthy term the difficulty is greater. Reference has been made above to an indefinite period. At the present time it is material to observe that the Courts must assume an indefinite interruption, if the purposes contemplated by the licensee must necessarily be suspended for the period of the war. The Courts cannot attempt to estimate the duration of the war: see, e.g., *Geipel v. Smith* (1872), L. R. 7 Q. B. 404; and *dicta*, [1916] 2 A. C., at p. 411; [1918] A. C., at p. 189. But even an indefinite interruption may not be sufficient to discharge the contract if the licence is for a lengthy period, e.g., for a period of twenty-one years; see *Fried Krupp, etc. v. Orconera Iron Ore Co.* (1919), 88 L. J. Ch. 304; but note that there the contract contained a suspension clause in connection with delay arising from any unavoidable cause. As to the test to be applied in order to determine whether a "licence" is in fact a letting, see *Clore v. Theatrical Properties, Ltd.*, [1936] 3 All E. R. 483.

The case of *Krell v. Henry* (*supra*) is strictly a case of a licence or tenancy, although generally referred to as the "hiring" of a flat. But whether it was in truth a hiring, a licence or a letting it may safely be assumed that the result would have been the same, as the judgment was on the footing that the subject-matter was "rooms for the Coronation", and the rule in *Taylor v. Caldwell* was applied.

Let us assume, however, that an alien takes a flat for a year or more with the express object of residing in it. He takes possession. War breaks out and the tenant is interned. The fact that the tenant has entered into possession makes no difference. In many of the frustration cases the contract was partly executed. But the Court of Appeal in *Halsey v. Lowenfeld*, [1916] 1 K. B. 707 held that the liability of an alien enemy lessee under a lease made before the Great War is neither extinguished nor suspended during the war, and that the acceptance of rent from such a lessee is not trading with the enemy (b). There is a very similar decision

(b) But see the interesting question raised in "War Legislation", p. 227 (paragraph 3): i.e., whether this decision is now useless having regard to s. 1 of the Trading with the Enemy Act, 1939.

in the same year, where it was expressly held that an Aliens Restriction Order preventing an alien enemy from residing in the district where he had taken a flat was no bar to a claim for the rent of the flat. The tenancy agreement, which was for a term of three years, contained the usual undertaking by the tenant not to underlet or assign without consent, which was not to be unreasonably withheld. It was pointed out that the defendant was not compelled personally to occupy the flat but might assign or sub-let, and that the Restriction Order did not terminate the tenancy. Weight was attached to the fact that the term in the premises had vested in the alien enemy: *London and Northern Estates Co. v. Schlesinger*, [1916] 1 K. B. 20 (and see *Whitehall Court, Ltd. v. Ettlinger*, [1920] 1 K. B. 680). It is clear that the Courts had already begun to foresee technical and practical difficulties if the frustration doctrine were applied to cases in which interests in property had been granted. It is at this stage that the preliminary consideration of the doctrine in the earlier pages of this article becomes of value. If the loss lies where it falls and the parties are discharged only from obligations arising thereafter and any benefit received by either party can be retained by the party who has received it, what would be the position? The tenant would be left with the benefit of the tenancy agreement. Although the tenant could not occupy the property he would be under no liability to pay any further rent. Accordingly the tenant might, by letting the flat, reap the benefit of the rent receivable, paying nothing whatsoever to the landlord. For the moment we ignore the possibility of any difficulty which might arise from the alien enemy character of such a tenant, and also the distinction between the position of alien enemies in England and those in enemy territory. The same inequitable result would ensue from a frustrating event in the case of a British tenant. We may not merely suspect but may be assured from the subsequent case of *Matthey v. Curling* (*infra*) that once the matter has been considered in this light and a definite line of demarcation has been found between commercial contracts and leases and tenancy agreements the Courts will be loth to extend the doctrine of frustration to cases in which one of the parties will or may be left with a substantial continuing interest in property without having paid for it, and without any obligation to do so.

The situation was considered at length in the important case of :—

Matthey v. Curling, [1922] 2 A. C. 180.

(a) *Facts*.—The appellant was in the position of lessee under a lease granted by the respondent of a dwelling-house and land at

a yearly rent of £300 for a term of twenty-one years. The lease contained a covenant by the lessee to pay the rent, to keep the premises in repair, to deliver up in repair and to effect an insurance against fire in the joint names of lessor and lessee in £7,000, and in case of fire occurring to apply the insurance moneys in reinstatement. On January 29, 1918, the War Office under the Defence of Realm Regulations, took possession of the house and some other parts of the premises, but not the whole of the premises comprised in the lease. The parts so taken were used for the internment of German prisoners. On February 12, 1919, while the occupation of the military authorities still continued, the house was completely destroyed by fire. On March 25, 1919, the term granted by the lease expired, and on June 4, 1919, possession of the premises was given up to the respondent by the military authorities, who had continued in uninterrupted possession from the time when they first entered. Application was made to the War Office by the executors of the lessee for compensation, but the War Office refused to accept liability, stating that there had been no negligence on the part of anyone for whom the military authorities were responsible.

The lessor thereupon took proceedings against the lessee claiming the amount of the loss and arrears of rent. The quarter's rent up to March 25, 1919, the date of expiry of the lease, had not been paid. The lessees alleged (1) eviction by title paramount, (2) prevention by superior force from performance of the covenants of the lease. Both defences failed.

(b) *Lord Buckmaster's Judgment*.—Lord Buckmaster said that “eviction by title paramount means an eviction due to the fact that the lessor had no title to grant the term, and the paramount title is the title paramount to the lessor which destroyed the effect of the grant, and with it the corresponding liability for payment of rent”. His Lordship further observed that “in *Paradine v. Jane*, Ayleyn 26, eviction of a tenant took place by the action of Prince Rupert and it was held that this did not relieve the lessee of liability. The force was undoubtedly superior force but it was said that it was unlawfully exercised”. He was unable to see that this constituted a real distinction; the question for consideration was how far the lessor had been deprived of the benefit of his covenants, and an act lawfully or unlawfully done for which he was in no way responsible could not in his opinion have that effect unless the covenant could be construed as excluding the event. He mentioned the well-known case of *Baily v. de Crespigny*, L. R. 4 Q. B. 180, where a lessor had demised property and had entered into a covenant with the lessee that neither he nor his “assigns”

would permit building upon a paddock that fronted the demised premises. A railway company acquired this paddock under compulsory powers and erected on it various unsightly buildings. The lessee claimed damages against the lessor for breach of covenant, but it was held that he could not recover. Lord Buckmaster considered that the real ground of this decision was that if an event happens of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they would not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened. It was said in the *de Crespigny Case* that the Legislature, by compelling the lessor to part with his land to a railway company whom he could not bind, had created a new kind of assign which was not in the contemplation of the parties.

Pausing at this point, we may interpose the observation that the *de Crespigny* decision does not go to show that a man may not contract absolutely so as to render himself liable in damages in the event of his being unable, owing to superior force, to carry out his bargain, for the theory of the law is that a man should so limit his contract by safeguarding provisions as to exonerate himself from liability from all or any matters in respect of which he refuses to accept responsibility. It is submitted that the true *ratio decidendi* of the *de Crespigny Case* was that upon a proper interpretation of the covenant the word "assigns" meant persons to whom the property might pass in the ordinary course of events by devolution or voluntary dealings, and not a body acquiring the property under compulsory powers (c).

Lord Buckmaster considered that such a case had no application to a covenant entered into by a lessee, either to pay rent or to deliver up the premises. His words are: "He has bound himself to do these definite acts, and it is no excuse that circumstances which he could not control have happened and have prevented his compliance. Acts that would have been done by any sub-tenant or assignee of the premises might equally have been beyond his control, and it does not seem to me to make any difference that in the one case he would have allowed the occupation which resulted in the loss and in the other he did not."

There is a *dictum* of Grove, J., in the case of *Mills v. The Union of East London*, L. R. 8 C. P. 79, where property was compulsorily acquired by a railway company and the defendants

(c) But see the observation in Pollock on Contract, 10th ed., p. 303.

had agreed to keep the property in repair, that "the defendants could not effect the repairs and their liability ceased", but on examination of that case it will be found that the parties had agreed that the date between the time the notice to treat and the commencement of the Act was of no importance, the argument being confined to the question whether the liability enured until the date of taking of possession. In any event, if the *Mills Case* conflicts with *Matthey v. Curling* it must be treated as overruled.

There is also another case of *Harding v. Metropolitan Ry.*, L. R. 7 Ch. 154, which requires to be mentioned. In that case a railway company had compulsorily acquired leasehold premises and the lessee insisted that the company should give the usual indemnity. Lord Hatherley held that they must be compelled to give an indemnity to the vendor against the covenants of his lease, saying: "It would be a grievous injustice to take property by force from a man who is unwilling to dispose of it, and to leave him subject to a substantial rent of £600 a year, and to the other covenants and conditions of his lease." The clear deduction from that case is that the lessee remains liable on his covenants under the lease notwithstanding deprivation of the term by the exercise of legal powers. In these circumstances the first contention of the lessee failed.

Turning now to the defence of "impossibility of performance", Lord Buckmaster said that this phrase was one often lightly and loosely used in connection with contractual obligations. He observed that there was no question of performance being impossible owing to prohibition by statute for no law had prohibited performance, though enjoyment of the premises had been interfered with by legal powers. Further, he entertained grave doubt whether there was any impossibility in fact at all. He was satisfied that a terminable occupation by the military authorities during an uncertain time, and for which compensation may prove to be recoverable, constituted no answer to the obligations of the repairing covenant.

It will, however, have been observed that little more than a month elapsed between the date of the destruction of the house and the termination of the lease. Some interesting observations were made by Lord Atkinson on this point in the course of his judgment.

(c) *Lord Atkinson's Judgment.*—Lord Atkinson observed that "the lease . . . was not in any degree or to any extent invalidated", and that the title of the lessee to the hereditament demised was not in any way weakened although he had been inconvenienced by being deprived of the occupation or use of a portion of the

demised premises, "but nothing could less resemble in cause, character or nature eviction by title paramount, than what has happened". He instanced as a good example of an eviction by title paramount *Doe v. Meyler* (1814), 2 M. & S. 276, where there was eviction from a part of the demised premises by title paramount in such circumstances as to necessitate the apportionment of the rent. There, a lessor seised in fee of certain land was also tenant for life of other land, with a leasing power. He demised both lands, reserving one entire rent for the two. On his death the lease of the land of which he had been tenant for life was impeached on the ground that it was not warranted by the power. It was held void and the rent was apportioned. The decision was rested on the *dictum* in Co. Litt. 148b, that if a man be seised of two acres of land, one in fee and the other in tail, and make a lease for life or for years of both acres and on his death the issue in tail avoid the lease, the rent will be apportioned. He gave as the reason for this rule of law that the lessee loses not merely the use of the premises but all right and title to any estate or interest in it, although the rent reserved issues out of it together with the rest of the property. He could not find any case in which the rent was apportioned simply because the lessee was deprived of the use of a part of the premises, his title to that portion not being either assailed, displaced or weakened. He thought the trend of authorities was against any such result. He then dealt with *Monk v. Cooper* (1727), 2 Stra. 763, where the lease contained a covenant to repair premises unless they were demolished by fire. The lessee was sued for a year's rent. He pleaded the destruction by fire of the premises, that they were not rebuilt by the landlord during the whole year for which the rent was demanded, and that he had not had any enjoyment of the premises. This plea was held to be bad, the Court saying: "If the defendant has any injury, he will have his remedy; but he cannot set it off against the demand for rent." *Marshall v. Schofield* (1882), 52 L. J. Q. B. 58, appears to be to the same effect, and so it is if the demised premises are carried away by an extraordinary flood: *Carter v. Cummins*, cited in 1 Cases in Chancery 84.

Lord Atkinson expressly held that the rent was not apportionable. (It will have been noted that only a portion of the demised premises was requisitioned by the authorities.)

He thought it could be assumed that it was physically impossible for the lessee to deliver up possession of the demised premises in good repair and condition on the termination of the lease, since the destruction of the house had only occurred on February 15 and the lease expired on March 25. He considered that as the

covenant was absolute in form it was extremely doubtful, having regard to *Brown v. Royal Insurance Co.* (1859), 1 E. & E. 853, whether the performance of this covenant to deliver up in repair could be excused on the ground of impossibility. He did not think that the appellant was bound to deliver up the premises in good repair at the end of the term in the case of a covenant to lay out the moneys to be received in respect of the insurance. No time being fixed he considered that it could not be held that such a covenant must be performed while the lease is current. The fact that the lessor insisted on reinstatement necessarily implied consent by him to entry on the premises to complete the work of reinstatement. He pointed out, however, that the lessor could not, when requiring that the house be rebuilt for him under the covenant to reinstate, also recover damages under the covenant for failure to deliver up in repair because that would be giving him redress "both in meal and malt".

Redmond v. Dainton, [1920] 2 K. B. 256.

A lease of a dwelling-house contained a covenant by the tenant to repair, uphold, support, sustain and maintain it. The house was partially destroyed by a bomb dropped by enemy aircraft. Held, that the lessee was liable under the covenant to make good the damage. *Paradine v. Jane* (*supra*) followed.

Belfour v. Weston (1786), 1 T. R. 310.

What is to happen if the tenant agrees to repair "damage by fire excepted", and the premises are burnt down? The tenant must still pay the rent and there is no frustration of the lease.

Popular Catering Association, Ltd. v. Romagnoli,

[1937] 1 All E. R. 167.

The tenant, in this case, was responsible for repairs to the demised premises except settlements or works required through age or decay (unless caused by his negligence). The covenant for quiet enjoyment was limited to acts of the landlord or persons claiming under him. The premises were old, and owing to their condition the L.C.C. during the term served certain demolition notices and ultimately, under demolition orders, removed two storeys of the building. The landlord claimed arrears of rent. The tenant pleaded:—

- (1) Eviction by title paramount. As the landlord's covenant was limited to the acts of himself and persons claiming under him it is clear that such a plea was of no avail.

(2) Eviction due to the act or default of the landlord in failing to repair the premises.

(3) Frustration of the lease.

He also counterclaimed for an apportionment of the rent.

Actually this case broke no new ground. Both the apportionment and frustration points were already covered by *Matthey v. Curling* (*supra*). A lessor is under no obligation to repair unless he has contracted to do so; and as to the claim of wrongful eviction it had already been established by *Williams v. Gabriel*, [1906] 1 K. B. 155, if not by earlier decisions, that a limited covenant of this kind extends only to persons lawfully claiming *under* the landlord. The tenant's pleas were therefore unsuccessful.

As the normal "cesser of rent" clause does not extend to interference or eviction by reason of the exercise of compulsory powers it would seem desirable not only in the case of alien tenants, but in all cases (having regard to the wide powers of the Crown), to make provision for cesser or abatement of rent if the tenant is deprived of possession of all or any part of the property, or subjected to interference by reason of the exercise of any compulsory powers. In connection with any such cesser of rent clause it must be remembered that although the Apportionment Act of 1870 provides for the apportionment of rent *accruing* due, it makes no provision for rent which has *accrued* due. Accordingly, if the rent is payable in advance provision should be made for the apportionment of any rent payable or paid in advance and the repayment of the due proportion of any rent so paid.

INSURANCE AGAINST FIRE OR OTHER DAMAGE.

As to war damage generally it is not proposed to deal here with the provisions of the Landlord and Tenant (War Damage) Act, 1939. Suffice it to say that neither landlord nor tenant is responsible for the making good of any damage caused by enemy action or steps taken in repelling such action or in preventing the spread of damage caused by or in repelling enemy action. At present it is impossible to insure against war damage, and it has for many years past been the practice of insurance offices to insert in fire policies an exception in respect of military operations. Cases can be instanced in which lessors have, even recently, insisted upon a covenant by the tenant to insure buildings comprised in the demise against damage by "fire" without qualification. It would seem that it must be assumed that both parties regard the covenant as impossible of performance at present, since it is (more or less) general knowledge that insurance against fire caused by incendiary

bombs dropped by enemy aircraft cannot be obtained. The point is of importance because the Landlord and Tenant (War Damage) Act does not exempt the lessor or lessee from liability to insure against war damage if he has covenanted to insure against fire and/or damage caused by missiles dropped by aircraft.

The fact that the ordinary tariff office fire policy excepts (in one form or another) liability in respect of military operations is no answer to an action for damages in respect of failure to insure against such excepted risks, if insurance against those excepted risks *can* be obtained: *Enlayde v. Roberts*, [1917] 1 Ch. 109. So long as it is impossible to obtain from *any* insurers cover in respect of war damage, it is felt that the Courts will assume that the lessor or lessee (as the case may be) cannot seriously have expected the performance of the impossible: see *Clifford v. Watts* (1870), L. R. 5 C. P. 577. *Lex non cogit ad impossibilia*; but whether that latin tag is part of the law of England is very doubtful. It has been observed by many text-book writers that an agreement to jump over the moon, being obviously impossible, is void. But such cases as *Hills v. Sughrue* (1846), 15 M. & W. 253; *Thornborow v. Whitacre* (1706), 2 Lord Raymond 1164; *Lloyd v. Crispe* (1813), 5 Taunt. 249; *Hale v. Rawson* (1858), 27 L. J. C. P. 189; *Thorn v. Mayor of London* (1876), L. R. 9 Ex. 163 (affirmed, 1 A. C. 120); *Jones v. St. John's College, Oxford* (1870), L. R. 6 Q. B. 115, throw grave doubt on this proposition. So also does the observation in the Buckmaster Committee's Report (above referred to) that: "*Prima facie*, if a man binds himself by contract unconditionally to do that which turns out to be impossible, he will be held to his bargain and have to pay damages for his failure to perform." That observation is followed by a statement that if "the impossibility arises from a cause that neither party can reasonably have contemplated" the promisor will not be bound. But if the tenant enters into the covenant (knowing of the impossibility of insuring against fire caused by military operations) because he particularly wants the property and cannot obtain the lease without accepting the covenant it can hardly be said that he has not "contemplated" the "cause" of the impossibility of performing the covenant.

Perhaps a *via media* may be found by the Courts. In the case of *Enlayde v. Roberts* (*supra*) it would seem that it was impossible at the date of the lease to insure against damage by incendiary bombs dropped by enemy aircraft. Later, the Government instituted an insurance scheme covering such risks. The lessor having covenanted to insure against fire (without qualification) failed to effect cover under that scheme, and was held liable upon his

covenant. It would seem, therefore, that an absolute covenant to insure against "fire" or even against "missiles dropped from enemy aircraft" is not a nullity. Argument as to the actual, as distinct from the implied, intention of the parties in such a case would hardly be material or admissible. It would be reasonable for the Court to conclude that the contract meant that the lessor, or lessee, would insure against damage by fire arising from war operations *when such insurance became possible*. Meanwhile it is suggested that the following proviso should be inserted in all covenants, whether by lessor or lessee, to insure buildings against damage by fire:—

"Provided that this covenant shall be deemed to be complied with by effecting a fire policy in the standard form issued by any of the tariff offices or by Lloyd's at the date hereof."

Even if present impossibility will excuse the covenantor from liability from effecting an unqualified policy, which is not certain, it seems clear from *Enlayde v. Roberts (supra)* that if such insurance becomes possible, and the covenantor forgets to take the necessary additional cover, the oversight may prove a very expensive matter.

If the landlord insists upon a covenant to insure against war damage when such insurance is possible, the tenant should ask that the covenant be preceded by the words "within [four] days after written request by the landlord", so that the tenant may not be penalised by oversight or want of knowledge that such insurance has become possible.

Certain special "mutual insurance" schemes are already operative, under which cover against war damage can be obtained, although it is not possible to effect an immediate reimbursement policy. If the tenant covenants to insure against damage by fire (without qualification) it is arguable that the tenant is under an obligation to effect such cover as is obtainable; but it is submitted that the Courts would strain against such a view. In the Report of the Conference presided over by Lord Weir in connection with war damage to property (Command 6116 of 1939) the following remarks were made: "Whilst we do not suggest that there is any intention to induce the public by misrepresentation to subscribe to these schemes, we are of the opinion that many of the appeals made to the public on behalf of the promoters are put in such a form as in fact to mislead the public into thinking that a substantial element of cover against the risk of damage is offered to them" (d).

(d) The Restriction of Advertisement (War Risks Insurance) Act, 1939, now restricts the distribution of circulars and the publication of advertisements

The opinion is here expressed that a covenant to insure against fire with an "insurance office" would not render the covenantor liable to effect a policy with such mutual war risks bodies as are now operating.

It is settled by *Upjohn v. Hitchens*, [1918] 2 K. B. 48, that a covenant to insure against fire in a named office is satisfied by effecting a standard fire policy with that office even if war damage is not covered by such a policy.

relating to the insurance of property against war risks. But it does not render unlawful anything done :

- (1) For the purposes of the War Risks Insurance Act, 1939; or
- (2) With a view to inducing persons to effect an insurance if the Minister of Shipping could under ss. 1 or 2 of the last-mentioned Act lawfully reinsure the person liable under the contract of insurance; or
- (3) With a view to inducing persons to effect an insurance of goods consigned for carriage by sea or air while in transit.

WILLS IN WAR TIME.

By J. MUIR WATT, of the Inner Temple, Barrister-at-Law.

The existence of a state of warfare has important reactions upon both the law of wills and the practice of will-making. It brings into prominence those statutory provisions in our law which enable members of the armed forces and merchant seamen to make wills under privileged conditions. It also provides a background against which all testators must review their testamentary arrangements and consider whether they are adequate to meet the new contingencies which may arise. The precise scope of the military privilege in the conditions of a war such as the present one is, as will be seen, not wholly clear. The old cases were decided when military service meant service overseas, and the possibility of considerable bodies of soldiers being permanently stationed at home for the purposes of anti-aircraft defence had not arisen. They were also decided at a time when women were only attached to the armed forces in the capacity of nurses, and before the emergence of large bodies of women whose status is, at any rate, quasi-military. Judicial decisions have already shown that the testamentary favour shown to the British soldier is more extensive than the simple privilege of the Roman legionary, from which it was derived (a), and the complex conditions of modern warfare are very different from a Roman "*expeditio*". While the Courts will no doubt firmly uphold this privilege in cases in which it is really applicable, it is improbable that they will widely extend a dispensation which opens the door to the mischief which the Statute of Frauds and the Wills Act were designed to prevent.

WILLS OF SOLDIERS AND AIRMEN "IN ACTUAL MILITARY SERVICE".

Though the testamentary privilege given to the soldier "in actual military service" is coupled, in section 11 of the Wills Act, 1837, as in section 23 of the Statute of Frauds (which it substantially reproduces) with that given to the "mariner or seaman being at sea", the conditions of the soldier's privilege are quite

(a) Sir Leoline Jenkins claimed to have secured the Roman privilege for English soldiers during the preparation of the Statute of Frauds: see *Drummond v. Parish*, 3 Curt. 522, 531.

different. It demands for its existence a state of warfare (b), though the war may be only a small one, such as the operations against the king of Ashantee (c), or the Maori Wars (d). A soldier or airman (e) who fulfils the condition of being "in actual military service" can to-day dispose of all his real and personal property (subject to a possible exception to be mentioned presently) notwithstanding infancy (f) with the same informality as that with which all Englishmen could dispose of their personal estate before the Statute of Frauds (g). He may do it by means of an unattested letter of the most informal character (h), or it may be purely oral—"If I stop a bullet everything of mine will be yours" (i). There is no need for any "*rogatio testium*" such as nuncupative wills required after the Statute of Frauds (k), provided there is testamentary intention (l).

The possible restriction just referred to upon this ample privilege concerns the position of an infant soldier in actual military service who dies without having been married and entitled "under a settlement" to an equitable fee simple. By section 51 (3) of the Administration of Estates Act, 1925, where an infant dies after the commencement of that Act without having been married, and independently of that section he would at his death have been equitably entitled under a settlement (including a will) to a vested estate in fee simple, such infant shall be deemed to have had an entailed interest and the settlement shall be construed accordingly. By section 1 (ii) (d) of the Settled Land Act, 1925, any instrument under which land stands limited for any person being an infant for an estate in fee simple creates or is for the purposes of that Act a settlement, and section 51 (3) of the Administration of Estates Act, 1925, applies to such notional settlement (m). Section 51 (3) is in an Act which is dealing with succession on intestacy and is not primarily concerned with wills at all. Is it to be considered to diminish the testamentary privilege of infant soldiers in actual

(b) *In b. Hiscock*, [1901] P. 78, 82.

(c) *In b. Thorne*, 4 Sw. & Tr. 36.

(d) *In b. Spratt*, [1897] P. 28.

(e) Wills (Soldiers and Sailors) Act, 1918, s. 5 (2).

(f) Wills (Soldiers and Sailors) Act, 1918, s. 1.

(g) *Godman v. Godman*, [1920] P. 261, 269, 279—280.

(h) *Gattward v. Knee*, [1902] P. 99; *May v. May*, *ibid.* 103.

(i) *In b. Stable*, [1919] P. 7; cf. *In b. Wardrop*, [1917] P. 54; *In b. Scott*, [1903] P. 243.

(k) Statute of Frauds, ss. 20, 21 and 22; and see *Lemann v. Bonsall*, 1 Add. 389.

(l) *In b. Donner*, 62 S. J. 161 (a hard case; *In b. Blunt*, [1923] P. 57, is rather difficult to reconcile with it).

(m) See *Re Taylor*, [1931] 2 Ch. 242: in this case the infant was the heir of his father who died intestate before 1926; and it was held that s. 51 (3) applied to the notional settlement created by the father's intestacy.

military service? Immediately before January 1, 1926, an infant soldier in actual military service could by virtue of section 11 of the Wills Act, 1837, and section 3 (1) of the Wills (Soldiers and Sailors) Act, 1918, have disposed by his will of a fee simple estate in freehold land. On January 1, 1926, two Acts came into operation. By one of them (section 51 (3) of the Administration of Estates Act, 1925) an infant who dies without having been married entitled under a settlement to an equitable fee simple is deemed to have had an entailed interest. By another of them (section 176 of the Law of Property Act, 1925) a tenant in tail *of full age* can dispose of property of which he was tenant in tail in possession at his death by his will, provided that the will refers to the property, or the instrument under which it was acquired, or to entailed property generally. It may be suggested that section 176 can be read as meaning "a tenant in tail who is of full age in the case of persons who are not privileged by section 11 of the Wills Act and section 3 (1) of the Wills (Soldiers and Sailors) Act, but in the case of persons so privileged then whether they are of full age or not". In other words, the words "of full age" must be read subject to the special privilege given by those Acts to a particular class of testators. It is, however, on this view difficult to see why these words were put in at all, because if they were only intended to refer to unprivileged testators they were quite unnecessary. Section 7 of the Wills Act had already provided that *they* must be of full age. It can hardly be said that they were put in *ex abundanti cautela*, because no one could suppose that a section in an Act conferring a new right to dispose by will of a special type of property was to be construed to alter, by a side wind, the general law of testamentary capacity prescribed by the Wills Act. On the whole it seems that section 51 (3) of the Administration of Estates Act does in one respect abrogate the testamentary power of infant soldiers on actual military service as existing before January 1, 1926. The abrogation is not unimportant, because all land to which an infant is entitled is deemed to be settled and section 51 (3) applies to such notional settlements (*n*). The position is therefore that if an infant soldier makes a will and dies while in actual military service his will cannot, unless he is married, dispose of an equitable fee simple which was vested in him. If he derived it, say, under his father's will it will revert to his father's estate, and will either pass under a residuary gift in that will, or, if it was itself the subject of a residuary gift, under the father's intestacy. Supposing, in the last case, the father

(n) *Re Taylor*, [1931] 2 Ch. 242.

(being a widower) had left surviving him no relatives other than the son coming within the categories specified in section 46 of the Administration of Estates Act, 1925, the property would go to the Crown in preference to, let us say, the son's fiancée, to whom he has left all his property.

Subject to this exception the privilege is a generous one and the conditions under which it arises ought not to be unduly relaxed. The words in the Statute of Frauds and the Wills Act—"in actual military service"—may be derived from Swinburne (o), whose phrase is "such as are in expedition or actual service of wars", and it is clear that this in turn is derived from the Roman expression "*expeditionibus occupati*". The leading case of *Drummond v. Parish* (p) (in which it had been contended that all soldiers on full pay were in actual military service) decided that the privilege is confined to "an expedition". What this means in English law was laid down by Sir F. H. Jeune, P., in *In b. Hiscock* (q). There must be a state of war existing and the soldier must have taken some step towards joining the forces in the field. The same Judge in *Gattward v. Knee* (r) laid it down that mobilisation is the commencement of what in Roman law was called *in expeditione*. In the Irish case of *In b. Godley* (s) it was said that where confidential instructions are issued by the War Office to the effect that an order for mobilisation may in certain contingencies shortly be issued, an officer to whom such instructions are communicated, and whose regiment was designated for inclusion in any force that might in such contingencies be mobilised, and which was in fact included in a force subsequently mobilised, will be held to have been in actual military service as from the date on which such instructions have been communicated to him. It is beyond doubt that a soldier who was on his "overseas leave" or "embarkation leave" would be in actual military service (t), but it is equally beyond doubt that the conception of actual military service extends further than that. It is clear that all soldiers who are in barracks with a view to being subsequently drafted to an overseas front are in actual military service (u). It seems impossible to lay down any limit as to how imminent the order for embarkation must be. That will depend on the military situation at the front. If a soldier is part of a force which is mobilised—i.e., placed under

(o) Swinburne on Testaments, quoted in *Drummond v. Parish*, 3 Curt. 522 at 538.

(p) 3 Curt. 522.

(q) [1901] P. 78, 82, 83.

(r) [1902] P. 99.

(s) 41 Ir. L. T. 160.

(t) *In b. Stable*, [1919] P. 7; *In b. Kitchen*, 35 T. L. R. 612.

(u) *In b. Hiscock*, [1901] P. 78, 84.

military orders with a view to some step being taken forthwith for active service (x), then, although the force has not yet received embarkation orders, such a soldier is in actual military service.

Would the privilege apply to young men who have volunteered or have been called up and have proceeded to military camps with a view to four or perhaps six months' further training before being liable to be sent overseas? It would seem clear that it does. Would it apply to young men who have registered under the National Service (Armed Forces) Act, 1939, but have not yet been ordered to proceed for training? In the New Zealand case of *Re Bowden* (y) the deceased had volunteered for service with the New Zealand expeditionary force. He received official notification that his offer had been accepted and he was directed to proceed to a military camp. Just before he left for the camp he wrote a testamentary letter which was unattested. It was held that he was not a "soldier". He had not taken the oath of allegiance. He could have changed his mind and declined to proceed to the camp without incurring any penalty. A person who fails to comply with the provisions of the National Service (Armed Forces) Act, 1939, or the regulations made thereunder is, of course, guilty of an offence under the Act and liable to a penalty. But at any rate until such a person receives "an enlistment notice" he can hardly be said to be a "soldier". The "enlistment notice" specifies a day upon which the person to whom it is addressed is to present himself at a specified place, and "the person upon whom the notice is served shall be deemed, as from the day so specified, to have been duly entered or enlisted for service in the force so specified, and the term or period for which he is so entered or enlisted shall, notwithstanding anything in any Act or regulations, be deemed to be from the beginning of the said day until the end of the present emergency" (z).

Is overseas service an essential part of the conception of "actual military service"? It is submitted that it is not, though all the decided cases are cases of overseas service. An invasion of England in the form of air attack is a new phenomenon and calls for new forms of military service. There is no sufficient ground in principle for limiting "actual military service" to service overseas. There are *dicta* in support of this view. In *In b. Hiscock* Sir F. H. Jeune said (a):—

"In case of invasion or civil war—both circumstances which

(x) *Gattward v. Knee*, [1902] P. 99, 102.

(y) [1916] N. Z. L. R. 835.

(z) National Service (Armed Forces) Act, 1939, s. 4 (1).

(a) [1901] P. 78, 83.

were more present to the minds of the persons who framed the laws of this country in the time of Charles II than they are to the legislators of our own time—the step might be merely that a man was taken from his home to man the walls or defences of his own native town. In the case of invasion, I should imagine, for instance, that a man living at Dover, and who was called upon to go into the fortifications at Dover and to assist in the defence, would have been within the meaning of the term ‘*in expeditione*’ or ‘actual military service’ although the movement made or step taken by him would be small in point both of time and locality or distance.”

In the case of *In b. Kitchen* (b) Coleridge, J., said in the course of the argument: “Suppose that a soldier had been ordered to go to the coast of Norfolk to man the trenches against a threatened invasion, would he not be entitled to make a soldier’s will?” And later on he says: “There are three points—Was the soldier in barracks? Was there a state of war? and, Was the soldier there for the purpose of the war?” On this principle the privilege would extend to the members of the anti-aircraft Territorials now embodied who are not liable for overseas service and to airmen on “balloon barrage” duty. This is in harmony with the Roman rule that they were *in expeditione* “*imo quocumque loco sint militiæ causa, ut si Romæ sint ad defensionem urbis collocati et dispositi*” (c).

What is the position of women who are members of the W.A.T.S. or the W.A.A.F.? Are they “soldiers (or airmen) in actual military service”? Are the members of the W.R.N.S. “members of His Majesty’s naval or marine forces . . . so circumstanced that if they were soldiers they would be in actual military service”? (d). Two cases have come before the Courts on section 11 of the Wills Act relating to the wills of women. *In b. Hale* (e) was the case of the lady typist on the *Lusitania*, which is dealt with later. *In b. Stanley* (f) was the case of a nurse who made an informal will after she had received orders to re-embark on a hospital ship. She was under a contract with the War Office by which she had agreed to serve for twelve months from the date of entering on duty or until her services should no longer be required, whichever should first happen. Previously to the War she had been a member of the Territorial Force Nursing Service and in January 1915 she was mobilised for duty. She was sub-

(b) 35 T. L. R. 612, 613.

(c) Calvin in *Lexicon Juridicum*, cited in *Drummond v. Parish*, 522, 535.

(d) S. 2 of Wills (Soldiers and Sailors) Act, 1918.

(e) [1915] 2 Ir. R. 362.

(f) [1916] P. 192.

sequently seconded for service with the Queen Alexandra Imperial Military Nursing Service. It is to be observed that at the date when she made her informal will she had received embarkation orders and was in a position analogous to that of a soldier who had received orders to proceed to the front. The majority of women members of the A.T.S. are enrolled for general service within the United Kingdom or overseas if necessary. Certain companies, however, are only required for local service. It seems clear that a member of this body who had received orders to proceed to France to serve behind the lines would be in the same position as the nurse in *In b. Stanley*. The Courts would obviously be reluctant to hold that the privilege extended further than this. But if men engaged in home defence are in actual military service it is a little difficult to say that women members of the A.T.S. are only in actual military service if they are *en route* for an overseas front. Fortunately, at the time of writing, serious air attacks on this country have not yet occurred. But if they did "the front" or "the field" would include a large part of this island and the distinction between the overseas front and the home front would lose its meaning.

A soldier's will made in actual military service remains valid until it is properly revoked. There is no limitation in our law upon the period of its validity such as the provision in the Roman law by which it only remained valid for a year "*post missionem*" (g). A particular will may, of course, be intended to be conditional, *i.e.*, to operate only in the event of the testator's death during the war (h), but a mere reference in it to the possibility of the testator being killed in action will generally be taken to be a statement of his motive for making it rather than the expression of a condition limiting its operation.

How can a soldier's will made in actual military service be revoked? To answer this correctly certain distinctions must be drawn :—

(1) A soldier's will is revoked by marriage (i). Section 18 of the Wills Act applies to all wills. Wills made by soldiers in favour of their fiancées whom they afterwards married have in a number of cases failed because of ignorance of this rule. To prevent this, on a marriage being reported in the Army the officer in charge of records now sends any will which has been deposited with the Army authorities for safe custody to the soldier's commanding officer for return to the soldier.

(g) Inst. 11, tit. XI; contrast *Re Leese*, 17 Jur. 216, and *Re Booth*, [1926] P. 118.

(h) *In b. Spratt*, [1897] P. 28.

(i) *In b. Wardrop*, [1917] P. 54; *In b. Blunt*, [1923] P. 46, note, at 57.

(2) If the soldier is still in actual military service the methods of revocation prescribed by section 20 of the Wills Act in the case of unprivileged wills do not apply. Thus a destruction of the will carried out by the testator's direction but not in his presence will suffice (*k*). This may be put either on the ground that section 20 has no application at all to a soldier's will, the power of revocation being merely another aspect of the power of disposition and that power being unaffected by the Wills Act (*l*), or on the ground (*m*) that when section 20 says "executed in the manner in which a will is hereinbefore required to be executed" it means "executed in the manner hereinbefore required for the execution of the particular type of will which it is intended to revoke". In the case of a civilian's will certain forms are requisite, while in the case of a soldier's will no forms are necessary, for execution, and hence in the case of a soldier no forms are requisite for revocation. Before the Statute of Frauds there were no prescribed forms for revocation of any will, and the soldier's will stands now in the position in which all wills of personalty stood before the statute.

(3) If the soldier has ceased to be in actual military service he must revoke his informal will according to the ordinary formalities prescribed by section 20 (*n*). He is no longer in any way privileged. Lord Merrivale, in the case which decided this, expressly left open the question whether section 20 applied to the case of a purely nuncupative will (*o*). But it is difficult to see how any different rule can apply to such a will without conferring a soldier's testamentary privilege upon a person who has ceased to be a soldier.

(4) An infant soldier who has made a will while in actual military service, and who ceases to be in actual military service before he ceases to be an infant, is in rather an awkward condition. He cannot revoke his soldier's will, except by getting married, and he cannot make a new will until he attains his majority (*p*). His soldier's will is thus riveted round his neck until that date no matter how distasteful and (in the events) possibly inappropriate its provisions may be.

The Courts have held that certain provisions of the Wills Act apply to these privileged wills, while other provisions in the Act have no application, *e.g.*, section 15 (gifts to attesting witnesses) does not apply (*q*), nor does section 20 (methods of

(*k*) *In b. Gossage*, [1921] P. 194.

(*l*) As it was put by Younger, L.J., in the above case.

(*m*) As it was put by Sterndale, M.R., and Warrington, L.J., in the above case.

(*n*) *Re Booth*, [1926] P. 118.

(*o*) *Ibid.* 137.

(*p*) See *per* Younger, L.J., in *Re Wernher*, [1918] 1 Ch. 339, 357.

(*q*) *Re Limond*, [1915] 2 Ch. 240.

revocation) (r), while section 27 (exercise of a general power of appointment by a general gift) does apply (s), as does section 18 (revocation by marriage) (t). Younger, J., in *Re Wernher* (u) was himself inclined to the view that section 7 (age of capacity) did apply to such wills, but this was contrary to authority and has been otherwise settled by Statute (x). There is obviously a certain danger in holding that informal written or, still more, nuncupative, wills may operate to exercise general powers of appointment by mere general gifts. A soldier may believe that he is only disposing of his personal effects, arrears of pay, and perhaps a sum at the bank, and have no intention to exercise a power over a settled fund. The same, however, would apply to a reversionary interest the existence of which may not have been present to the testator's mind.

Conveyancers as such are not directly concerned with these informal wills, unless perhaps when they get one sent to them for an opinion on its construction. But they are likely to find themselves concerned with the law relating to privileged wills for one purpose. They may be asked to draw a formal will for an infant who is serving in the Army. It is unlikely that the legal difficulty as to the revocation of such a will if the infant should cease to be in actual military service before attaining his majority will in practice give rise to much trouble, since the infant in question is probably not much under twenty-one and the anomalous legal condition of being under a testamentary disability, but in possession of a valid testament, will soon come to an end. It should, however, be considered whether it is desirable to make the operation of the infant's will conditional on his death during actual military service. This would be a method of meeting the difficulty about revocation. It would secure that the infant would not have a will which he disliked riveted round his neck after he had ceased to be in actual military service. It would then automatically cease to be effective. An infant soldier in actual military service who desires to have a formal will drawn is likely to be entitled to certain interests or shares in property if he should attain twenty-one. In that case it may very well be that he will desire different sets of dispositions to take effect according to whether he should come into such interests or not. It will then be desirable to divide the will into two alternative parts—one to come into

(r) *In b. Gossage*, [1921] P. 194.

(s) *Nixon v. Prince*, 34 T. L. R. 444.

(t) *In b. Wardrop*, [1917] P. 54; *In b. Blunt*, [1923] F. 57.

(u) *Re Wernher*, [1918] 1 Ch. 339.

(x) Wills (Soldiers and Sailors) Act, 1918, s. 1.

operation if he should die under twenty-one, the other if he should die after having attained twenty-one.

WILLS OF "MARINERS OR SEAMEN BEING AT SEA".

It has for long been well settled that "mariners or seamen" include merchant seamen as well as seamen in the Royal Navy (*y*), and that the description extends from a common seaman to the commander-in-chief (*z*). (The words "seaman or marine" within the meaning of the Navy and Marines (Wills) Act, 1865 has, of course, a much narrower connotation. It has no application to the merchant service and excludes large naval categories: see the list of persons exempt from the provisions of that Act as supplied by the Accountant-General of the Navy (*a*).)

In order that he should be entitled to the privilege of making an informal will a seaman must be at sea in his capacity as a seaman. In *In b. Saunders* (*b*) a naval surgeon who was returning home on sick leave made an informal will while a passenger on a P. and O. liner. It was held that he was a seaman at sea, but Sir J. P. Wilde expressly guarded himself against deciding that in all cases a seaman by profession who happens to be at sea on some occasion wholly dissociated with his profession is entitled to the benefit of section 11. He thought it applied in that case, because though not on duty he was returning home invalided from service. As Horridge, J., pointed out (*c*), Saunders was obviously at sea: the real question was whether he was a "seaman" and not merely a passenger.

As one would expect, the expression "at sea" has given rise to questions in some borderline cases. There is not much difficulty in holding that wills made on board a ship in the Margate Roads (*d*), or lying at Gravesend (*e*), or in the Rangoon River (*f*) were made "at sea". A paper written by a seaman while on "shore leave" has been held to have been made "at sea" (*g*), and so has a will made on board a ship the day before she sailed for foreign service (*h*). On the other hand the will of an admiral of the Jamaica station made in his official house on shore where he

(*y*) *In b. Milligan*, 2 Rob. 108.

(*z*) *In b. Hayes*, 2 Curt. 338, where reference is made to the *Earl of Euston* v. *Lord Henry Seymour*: see also *In b. Austen*, 2 Rob. 611.

(*a*) Mortimer, Probate Law and Practice, 2nd ed., 446, note (*x*).

(*b*) L. R. 1 P. & D. 16.

(*c*) *In b. Thomas*, 34 T. L. R. 626.

(*d*) *In b. Milligan*, 2 Rob. 108.

(*e*) *In b. Patterson*, 79 L. T. 123.

(*f*) *In b. Austen*, 2 Rob. 611.

(*g*) *In b. Lay*, 2 Curt. 375.

(*h*) *In b. Rae*, 27 L. R. Ir. 116.

permanently resided (i), of a cross-Channel skipper made in his house at Holyhead (k), of a naval officer made in hospital at Haslar in the course of 49 days sick leave (l), of another naval officer made in the course of leave which he had obtained to get married (m), have been held not to have been made "at sea".

The celebrated case of *In b. Hale* (n), in which a woman typist who went down with the *Lusitania* was held to have made her will while a "mariner or seaman at sea", appears to be wrongly decided, not because she was not a "mariner or seaman", but because she was not "at sea". Her testamentary dispositions were contained in letters which she wrote at Liverpool after she had received instructions to sail with the *Lusitania*. Madden, J., decided she was "at sea" on the analogy of the military cases which laid it down that a soldier under orders to proceed to the front was "*in expeditione*". It is difficult to find any justification for this view. "At sea" is a definite state of fact which bears no real analogy to "actual military service" (o). In fact Madden, J., without any statutory authority, went as far as section 2 of the Wills (Soldiers and Sailors) Act, 1918. This can be seen by comparing his decision with *In b. Yates* (p), which was a decision on section 2. In that case a naval officer was appointed to a ship and before leaving his home in Southsea to join his ship made an oral declaration of his testamentary intentions in favour of his wife. It was held that section 2 applied and this was a good nuncupative will.

The testamentary privilege of one particular category of "mariners or seamen", namely, "seamen or marines" within the meaning of the Navy and Marines (Wills) Act, 1865, is curtailed in an important respect. They cannot dispose of "naval assets" (q), *i.e.*, wages, prize money, bounty money, grant, or other allowance in the nature thereof, or other money payable by the Admiralty, or any effects or money in charge of the Admiralty (r), except by a will which is executed with the ordinary formalities which are required in the case of unprivileged testators (s). The Navy and Marines (Property of Deceased) Act,

(i) *Earl of Euston v. Lord Henry Seymour* : see 2 Curt. 338 and 3 Curt. 530.

(k) *Barnard v. Birch*, [1919] 2 Ir. R. 404.

(l) *In b. Thomas*, 34 T. L. R. 626.

(m) *In b. Boulby*, 34 T. L. R. 626.

(n) [1915] 2 Ir. R. 362.

(o) Cf. the comments of Horridge, J., in *In b. Thomas*, 34 T. L. R. 626, 628.

(p) [1919] P. 93.

(q) This expression is found in the Order in Council of December 28, 1865, and is used in the Navy and Marines (Wills) Act, 1939.

(r) Navy and Marines (Wills) Act, 1865, s. 5.

(s) *Ibid.*, s. 5 (1), as altered by the Navy and Marines (Wills) Act, 1930.

1865, and the four Orders in Council made thereunder (*t*), set up machinery by which the disposal of money and effects under the control of the Admiralty belonging to deceased seamen or marines is regulated, and detailed instructions for accountant officers on this subject are contained in the King's Regulations and Admiralty Instructions (*u*). Before probate can be obtained of the will of a seaman to whom these Orders in Council apply a certificate has to be obtained from the Inspector of Seamen's Wills, who will state whether or not the will is valid to pass naval assets. If the certificate states that the will is invalid to pass naval assets probate will be granted "save and except any moneys payable by the Admiralty or any effects or money in charge of the Admiralty", and letters of administration limited to this property will be granted to the person entitled to a grant as on an intestacy (*x*). The Inspector of Seamen's Wills is a functionary who dates back to an Act of George III (*y*), and these provisions relating to the disposal of "naval assets" have a long legislative history. An Act of William III (*z*) dealt for the first time with the gross abuses which arose from the practice of seamen giving a power of attorney to receive their wages and coupling it with a will making such attorneys their executors and giving them their estate. The position at the present day is that a "seaman or marine" can, if he is "at sea", make a valid informal or even oral will, by virtue of section 11 of the Wills Act, but that such a will is not valid to pass "naval assets". It would pass, say, a sum in a Post Office Savings Bank, but not arrears of pay or prize money. To pass these it would require execution and attestation in the ordinary form prescribed by section 9 of the Wills Act, but an infant seaman who complied with these formalities could pass his "naval assets". The Navy and Marines (Wills) Act, 1939, gives the Admiralty a power to dispense with this requirement in the case of informal instruments appearing to the Admiralty to have been executed or made before the end of the emergency that was the occasion of the passing of that Act by a person while serving as a seaman or a marine and to have been intended by him to operate as a testamentary disposition of naval assets (either alone or together with any other property). This dispensing power is somewhat different from that which was given

(*t*) Dated respectively December 28, 1865 (the principal one), September 14, 1914, February 15 and September 7, 1916.

(*u*) See article 1769 (1939).

(*x*) Tristram & Coote's Probate Practice, 17th ed., 56; Mortimer, Probate Law and Practice, 2nd ed., 448.

(*y*) 26 Geo. 3, c. 63. He is now the Accountant-General of the Navy.

(*z*) 9 & 10 Will. 3, c. 41.

by the Navy and Marines (Wills) Act, 1914. The latter Act gave the Admiralty a dispensing power only in the case of a seaman or marine who died *during or in consequence of* the last war. The new dispensing Act places no limit to the period during which the testator must die. And though it provides that the instrument must have been executed *before the end* of the emergency it does not say that it must have been made *during* the emergency. It will be noticed that the Admiralty is only given a dispensing power as regards instruments executed by the testator. It could not exercise this power in relation to a memorandum made by another person recording a nuncupative disposition by, say, a mortally wounded seaman during a naval action, though this would be good for the purpose of passing all his property other than "naval assets".

Provisions respecting the money and effects of deceased merchant seamen on board ship and the balance of wages due to them, which are in some degree analogous to the above provisions as to naval assets, are to be found in section 177 of the Merchant Shipping Act, 1894, as extended by section 29 of the Merchant Shipping Act, 1906. Thus if the deceased merchant seaman has left a will which was made on board ship the Board of Trade may refuse to pay or deliver such money and effects to any person claiming under the will unless the will is in writing and is signed or acknowledged by the testator in the presence of, and is attested by, the master or first or only mate of the ship.

Soldiers and seamen in addition to the testamentary privilege which has been discussed have, in certain circumstances, a posthumous privilege of some importance, *viz.*, relief from death duties. Thus the property of common seamen, marines, soldiers, or airmen who are slain or die in the service of His Majesty is wholly exempted from estate duty, and the exemption extends to the death of a life tenant under the will of the common seaman, etc., as well as to his own death. This exemption does not extend to the higher ranks (a). And in the case of members of His Majesty's Forces, whatever their rank, who die from wounds inflicted, accidents occurring, or disease contracted while on active service, or on service of a warlike nature, or which, in the opinion of the Treasury, otherwise involves the same risks as active service, the Treasury may remit the whole of the duties on property up to the value of £5,000 and discount the duties on any additional property, according to the expectation of life of a person of the

(a) S. 8 (1) of the Finance Act, 1894 (incorporating Part III of the Schedule to the Stamp Act, 1815), and the Air Force (Application of Enactments) (No. 3) Order, 1918.

age of the deceased. These provisions apply only to property passing to the widow, lineal ancestors, lineal descendants, brothers and sisters and descendants of brothers and sisters of the deceased, but they apply to legacy and succession duty as well as to estate duty (b).

WILLS OF CIVILIANS IN WAR TIME.

Though the existence of a state of war has no direct legal effect on the capacity of civilian testators, except in the sense that many former civilians enter the armed forces, war presents testators with new facts and new problems.

It is obvious, for example, that the existence of a state of war has an important effect upon gifts made by will to one large category of people, namely, those who have become His Majesty's enemies. What is the effect of war upon a gift by will (a) to a German resident in Germany, (b) to a German refugee resident in this country? The position is regulated by the Trading with the Enemy Act, 1939, and the Trading with the Enemy (Custodian) Order, 1939, dated September 16, 1939, and made by the Board of Trade under section 7 of the Act (c). A distinction is drawn between "enemies" and "enemy subjects". A German resident in Germany is an "enemy", a German refugee in this country may be an "enemy subject". Thus it is an offence under the Act to pay a sum of money to or for the benefit of an enemy (d), and a sum of money which but for the existence of a state of war would be payable to an enemy must be paid to the Custodian of Enemy Property (e). Accordingly executors must pay to the Custodian a pecuniary legacy bequeathed by will to an enemy. If property is given by will to an "enemy" the executors must, within fourteen days after the property comes into their possession or under their control, notify the Custodian (f). If property is given by will to an "enemy subject" the executors must furnish the Custodian with such information as the Custodian may require (g). They are not, however, bound to notify the fact to the Custodian. The Board of Trade is given power to make vesting orders vesting any "enemy property" in the Custodian (h), and "enemy property" includes property belonging to an "enemy

(b) See s. 14 of Finance Act, 1900; s. 1 of the Death Duties (Killed in War) Act, 1914; s. 46 of Finance (No. 2) Act, 1915; s. 29 of Finance Act, 1917; s. 44 of Finance Act, 1918; s. 31 of Finance Act, 1919; s. 43 of Finance Act, 1921; s. 38 of Finance Act, 1924. See also on this subject s. 15 of Navy and Marines (Property of Deceased) Act, 1865, and s. 16 of Regimental Debts Act, 1893.

(c) S. R. & O., 1939, No. 1198.

(d) S. 1 (2) (a) (ii).

(e) See the Order, 1 (1).

(f) Order, 5 (i).

(g) Order, 5 (ii).

(h) Act, s. 7 (1) (b); Order, 2 (i).

subject" as well as to an "enemy" (i). A licence dated October 30, 1939, issued by the Board of Trade under section 5 of the Act, authorises the transfer to enemy subjects resident in the United Kingdom or France of stocks or shares in British companies.

There is nothing to prevent testators making gifts in their wills to "enemy subjects" or to "enemies", but while gifts made to "enemy subjects", *e.g.*, a German refugee in this country, will probably take effect without difficulty, gifts made to an "enemy" will become vested in the Custodian, there to await the termination of the war and the terms of the peace treaty, as a result of which they may become subject to a charge to secure various claims against German nationals or the German Government (k).

Passing to a question of more general interest to testators, it is obvious that the present war increases the danger, which the popularity of motoring and flying had forced upon one's attention before the war, of members of the same family being killed together in a common misadventure. Thus, to make a supposition which one hopes will never become a reality, if our cities suffer from massed air attack, it is likely that in many cases members of the same family will be killed simultaneously or so nearly so that it is impossible to discover which is the survivor. Section 184 of the Law of Property Act provides that: "In all cases where, after the commencement of this Act, two or more persons have died in circumstances rendering it uncertain which of them survived the other or others, such deaths shall (subject to any order of the court), for all purposes affecting the title to property, be presumed to have occurred in order of seniority, and accordingly the younger shall be deemed to have survived the elder." The operation of this section, while it prevents the testator's dispositions from failing entirely in a case where, say, a testator makes a gift to his wife if surviving him, but if she dies before him then to other persons (l), and it is impossible in fact to say whether his wife survived him or not, is not by any means a satisfactory one for testators, and reliance should not be placed upon it. There are two objections to it:—

(1) The first is the obvious one that the notional survival attracts a second estate duty which is only too actual. In these days this risk is not to be lightly incurred.

(i) Act, s. 7 (8) (a).

(k) Cf. the Treaty of Peace Order, 1919, as amended:—S. R. & O., 1919, No. 1517, as amended by 1920, Nos. 1410 and 2461; 1921, Nos. 268, 968 and 1644; 1922, Nos. 249 and 1419; and 1923, No. 148.

(l) *Wing v. Angrave*, 8 H. L. C. 183; cf. *In b. Alston*, [1892] P. 142; *In b. Beynon*, [1901] P. 141.

(2) The testator may not desire to give his property to such person unless he or she survives him not merely notionally but really. Suppose a man has recently married a young wife and they have no children. He makes a will leaving all his property, much of which he has derived from his own parents, to her. They are killed in an air-raid and the statutory presumption applies. The wife has died intestate. The result is that the property goes to his wife's relations instead of to his own, although there is little doubt that he would have desired otherwise. There are two ways usually suggested of getting over this difficulty. One is to make the gift to the wife contingent on her surviving him for a stated time, such as a fortnight or a month. The other is to give his wife a general power of appointment by deed or will, and in default of and subject to any appointment to give her a life interest in the property, with such subsequent trusts as he may desire. If the wife survives the testator in fact and in reality she can make the property her own by an exercise of the power. The objection to this second method seems to be that it would attract double duty, since the wife would be a person who, having been deemed to survive him, "was at the time of her death competent to dispose of such property" by virtue of her general power (m).

If the testator's dispositions are to his wife for life, with remainder to his children at twenty-one or, being females, on marriage, equally, then of course there is no need to make any special provision to provide against the simultaneous death of himself and his wife. The statutory presumption can apply, and no second death duty will be payable. But an awkward case might arise with regard to a son. Suppose there is in the will a substitution clause in favour of the children of any child of the testator's who died in his lifetime leaving a child or children living at the testator's death. Suppose the testator has a son aged twenty who is married and has a child. The son dies in the same air-raid as his father. The statutory presumption will apply. The son is deemed to have survived the father, so that the substitution clause does not take effect. But the son died under twenty-one and did not take a vested interest. Hence the son's child is totally unprovided for. The substitution clause in such a case is obviously defective unless it provides for the contingency of a son surviving the testator but dying under twenty-one leaving a child or children living at his death. It would be unsatisfactory to provide in the substitution clause in this case merely that if the son should die in the testator's lifetime *or if he should not survive*

(m) See s. 5 (2) of the Finance Act, 1894, as limited by s. 14 of the Finance Act, 1914.

the testator for the space of (say) one month, then his children should take by substitution. This still leaves open the possibility that the son might survive the testator by more than one month and then die under twenty-one. In such a case neither the son nor his children would take anything. The provision as to surviving for one month is, however, required in the case of a son who at the testator's death is *of full age*, or a daughter who is of full age or married, in order to avoid the double death duties. The substitution clause should therefore provide :—

- (a) for the case of any child of the testator's predeceasing him leaving a child or children living at the testator's death ;
- (b) for the case of any child of the testator's who, being at the testator's death (if a male) aged twenty-one or (if a female) aged twenty-one or married, does not survive the testator for more than one month, and leaves a child or children living at his or her death ;
- (c) for the case of a son who survives the testator but dies under twenty-one leaving a child or children living at his (the son's) death.

This does not provide for the possible, but unlikely, case of a son who is an infant at the testator's death but attains twenty-one after his death and nevertheless dies within a month of the testator's death, having attained twenty-one. Two duties would be payable in that case.

Section 184 of the Law of Property Act obviously applies to persons who are killed in the same air-raid or who perish in the same shipwreck. The language of the section is, however, somewhat vague. It makes no mention of a common accident or common misadventure. The words are "in circumstances rendering it uncertain which of them survived the other or others". Suppose a father dies in England as the result of illness and his son is killed somewhere about the same time in France, and it is "uncertain which of them survived the other". Does the section apply? They are not "*commorientes*" in the sense in which persons perishing in a common disaster are, the father having died in his bed in England and the son in the front line in France, but the section says nothing about a common disaster. The question is whether the extremely vague word "circumstances" refers to a concrete situation or to an abstract result. Must they die at or about the same place? The section is silent. If it is held that the section contemplates a certain community of misadventure or proximity of place (which it does not in plain English state) then, in the above example of the father and son, the old trouble exem-

plified in *Wing v. Angrave* (n) will arise. If the father has made a gift by his will to his son if he survives the testator, but, if not, then to other persons, the testator's disposition will fail altogether. This difficulty may be avoided by providing that if the testator's son shall die in his lifetime, or if in the opinion of his trustees it has not been satisfactorily proved that his son survived him, then the alternative gift shall take effect.

War unfortunately reverses the natural order of death. The young and vigorous die before the old. It is, therefore, important that testators should see that their wills make provision for the dependants of these young men, by appropriate provisions against lapse or substitution clauses, and with the added precaution, if thought desirable, of the above provision to prevent the application of *Wing v. Angrave*.

The impact of war finance upon the capital values of estates and upon the net yield of income must obviously be seriously considered by testators and many existing wills should be reconsidered in the light of this new factor. War means a steepening income tax; it means, probably, a rise in fixed interest rates as Government borrowing increases, with a consequent decline in the capital values of old fixed-interest-bearing stocks, and it means probably in the long run some degree of inflation with the consequent rise in prices, and hardship for those with small fixed annual incomes. There is, again, the possibility of a capital levy to be borne in mind and a possible increase in death duties. Legacies of large amount and any duty-free provisions in legacies to strangers, which attract a ten per cent. duty, should be reconsidered in relation to the probable value of the residue. Portions for younger children on the existing scale may unduly cripple the inheritance; instead of portions of fixed amounts it may be wise to make the portions a fraction of the net value of the testator's estate at his death. Any gifts of tax-free annuities should be reconsidered in the light of the present and probable future rates of income tax.

It is important to make certain that a wife who is given a life interest in residue should not suffer hardship in the future through high rates of income tax or through a reduction of income consequent upon a capital levy. She may be secured a minimum income by giving her in the first instance an annuity charged upon capital as well as income, and subject to that the income of the residue, or power may be given to the trustees to apply capital for her benefit, or she herself may be given an overriding power to appoint capital to herself, if the testator has full confidence in her financial good sense and fairness.

THE BUILDING SOCIETIES ACT, 1939.

From small and humble beginnings the building-society movement has, during the past century, advanced to a position not without importance in the social and economic life of the peoples of this nation and some others. However much one discounts, as one is entitled and tempted to do, the efforts of propagandists to invest this progress with the trappings of what passes, in the modern jargon, as “romance”, the facts remain that the societies’ activities have largely increased the numbers of small property owners beyond what they might have been had the movement not existed, and that a trend towards investment in bricks and mortar has been fostered with which the economist is bound to reckon, even if he disapprove it, as perhaps he may.

Until the conclusion of the First German War in 1919 there was little spectacular about the advance of the societies. Only two major measures appeared in the statute-book—the Acts of 1874 and 1894—to mark the interest of the Legislature in their activities. After 1919 the pace quickened. It is unnecessary here to examine the reasons which accelerated the rate of progress during the twenty years now ended; it suffices to note how much more influential the societies have become than they were formerly, how much more widespread is their influence, and how much keener the competition between them has become. In the result, new methods of business have been developed, and with them a growing body of criticism which has emerged at length as popular clamour. We need not concern ourselves in these pages with the merits of recent attacks on the methods of the societies; it is enough to observe that litigation has attracted to the doings of the societies the attention of public opinion; and after a forty-six years’ respite from legislative interference, the movement finds itself subjected to increased regulation.

The Building Societies Act, 1939, received the Royal Assent on August 4, 1939; it came into operation on November 1, 1939. The Act applies to Scotland, but does not extend to Northern Ireland. The Act requires certain forms to be prescribed for use in connection with certain transactions, and this has been done by the Building Society Rules, 1939, made by the Chief Registrar of Friendly Societies on October 9, 1939; these Rules (S. R. O. 1939, No. 1359)

came into operation at the same time as the Act, and may be had of H.M. Stationery Office or through any bookseller at the modest price of 2d.

A necessary preface to an explanation of the Act is a brief description of a system which has, in comparatively recent years, acquired importance in connection with building-society advances, and which is known among the societies and the "developers" of building estates as the "pool agreement". In outline, this system works in the following way. A speculative builder acquires, or contracts to acquire, an estate which he intends to lay out in plots for building small dwelling-houses. Having but limited financial resources, it is necessary for him to dispose to purchasers of one or more of the houses he builds, and receive the purchase-money, before he can continue his building operations. Further, the purchasers whom he has in view are people of the smaller sort, wage-earners not over-plentifully endowed with ready money, who, if they are to provide the funds necessary for the continuation and completion of the intended building development, will require larger accommodation by way of loans to assist their purchases than cautious lenders will normally be prepared to advance. The arrangement which ensues is one which may or may not deserve the reprobation which it has received from some social students; but it is a natural development of the modern tendency to extend the use of credit. The builder wants to complete his estate and pocket his profits as soon as may be, and the building society are constantly alert for fresh openings for investing their steadily increasing funds. The pool agreement between them is therefore arranged.

Under the agreement the society undertake that as each house on the estate becomes ready for sale they will advance on the security of a mortgage of the house a sum in excess of what, apart from the additional security afforded under the pool agreement, they would normally advance; and the builder undertakes to guarantee each mortgage to the extent of the excess. A sum of money is deposited as backing for the guarantee, to be used as what is called in business circles a "revolving credit". The builder completes a house to sell for, say, £800, and finds a purchaser who is prepared to take it at that price provided that he is called on to produce only (say) £50 in ready cash. The society regard the house as good security for a loan of £600—three-quarters of the purchase price; they advance, however, £750 to meet the purchaser's requirements, on the strength of the builder's guarantee under the pool agreement (of which the purchaser will normally be ignorant) in respect of the extra £150. The builder

gets his £50 from the purchaser and the £750 from the society, which enables him to build another house and to repeat the process. As time goes on, the amounts owing on mortgage are gradually reduced, by payment of instalments by the purchasers, until the principal secured by the mortgages is abated sufficiently to enable the society to release the builder from his liability under the guarantees. He is thus enabled gradually to redeem his deposit, or so much of it as remains unexpended after meeting the guarantees in cases where the purchasers have defaulted in keeping up their instalments.

Such in essentials is an ordinary pool agreement; in practice, as may be imagined, these agreements are frequently much more complicated. One of the principal objects of the recent Act is to curb, to some extent, abuses to which this system is believed to have lent itself. The Act is comparable, from the standpoint of the social historian, with the Hire-Purchase Act, which seeks to afford to purchasers of chattels a similar protection to that now extended to purchasers of land.

We can now turn to examination of the Act itself, and first we will look at the interpretation section, section 16, in which we shall find definitions of several expressions which must be understood if the Act is to be intelligible. The first two expressions the definition of which calls for attention are "Basic advance" and "Excess advance". Basic advance is defined as being, in relation to any advance made or to be made for the purpose of its being used in defraying the purchase price of freehold or leasehold estate, the maximum amount which the society would consider proper to advance upon the security of that estate if no other security were taken by the society; excess advance means, in relation to any advance, the amount by which the advance exceeds the basic advance. As regards leasehold property, it is provided that "purchase price" shall mean any sum payable as the consideration, or as part of the consideration, for the grant or assignment of the lease.

Another expression defined in section 16 is "Continuing arrangement"; this is to mean "any arrangement made between a society and another person whereby, in contemplation of a series of advances comprising excess advances being made by the society to members for the purpose of their being used in defraying the purchase prices of freehold or leasehold estates, that person undertakes to give to the society a series of guarantees, each of which is to secure sums payable to the society in respect of such an advance". The grammar of this definition is not above criticism, but the meaning is pretty clear; a "continuing arrangement" in

the Act means what has been described above as a "pool agreement". Sub-section 2 of section 16 contains an elaborate definition of the expression "additional security", to which reference may be necessary for the practitioner when dealing with a particular problem under the Act; for the purposes of this necessarily brief exposition of an elaborate enactment a sacrifice of precision may perhaps be justified, and it will suffice to say at this point that "additional security" means, roughly, security taken by a society for an advance other than the mortgage of the land itself.

"The security for an advance [*sc.*, by a building society to one of its members]", it is stated by Wurtzburg (*Law Relating to Building Societies*, 7th ed. [1935], p. 40), "must always consist of real or leasehold estate. . . . The mere fact, however, that pure personal estate is given as collateral security for an advance will not necessarily vitiate the whole loan, though the propriety of the transaction must be tested as if no such ingredient entered into it. If there be no freehold or leasehold estate comprised in the security, or if the estate so comprised be merely nominal, or its value out of all proportion to the amount advanced, the transaction is beyond the powers of the society, and invalid. The question for the officers of the society to determine is what amount may properly be advanced, and that question they must decide having regard solely to the nature and value of the freehold or leasehold estate offered to them, and without reference to the solvency of the borrower or the worth of any personal estate he may be willing to throw in by way of security." As authority for this statement of the law is cited *Sheffield & South Yorkshire Permanent Building Society v. Aizlewood* (1889), 44 Ch. D. 412, which has recently been approved in the Court of Appeal: *Halifax Building Society v. Salisbury* (*Times* newspaper, December 5, 1939).

The principle enunciated above is to some extent approbated by the new Act. But to regularize (what has undoubtedly been a prevalent practice in recent years) the taking into account of collateral security on such personal property as, *e.g.*, a life policy, in estimating the amount which might with propriety be advanced, the Act lays it down, in section 1, that "in determining the amount of any advance made *before the commencement of the Act*" (November 1, 1939) "upon the security of freehold, copyhold, or leasehold estate, a building society shall be deemed always to have had power to take into account, besides the freehold, copyhold, or leasehold estate, the value of any additional security for the advance".

For the future, however, restrictions on this power are imposed.

Section 2 enacts, with regard to advances by building societies to their members after November 1, 1939, upon the security of freehold or leasehold estate, that in determining the amount of an advance the society are *not* to have power to take into account the value of any additional security taken by them for the advance unless the additional security is of a specified class. The class of permitted additional securities is set out in Part I of the Schedule to the Act, and comprises eight items; they are (i) a charge upon a policy of life assurance; (ii) a guarantee given (whether in pursuance of a “continuing arrangement” or not) by an assurance company; (iii) a guarantee given (also whether or not in pursuance of a continuing arrangement) by a housing authority (local authority or county council) under section 91 (1) (b) of the Housing Act, 1936, or the corresponding enactment for Scotland; (iv) a charge given by the member upon money deposited with the society or upon any stocks, funds or shares in which trustees are for the time being authorised by any enactment in force in England or Scotland to invest trust money—in short, “trustee investments”; (v) (which only applies in the cases of special members and special societies) a charge given by the member upon the stock, shares or other securities of a public utility undertaking; (vi) a guarantee, *not being a guarantee given in pursuance of a continuing arrangement*, accepted by the society *with the written consent of the member*, and supported by a charge upon money deposited with the society or upon any such stocks, funds or shares as aforesaid; (vii) a charge upon money deposited with the society, being a charge which is given in accordance with arrangements which are approved by the Chief Registrar of Friendly Societies and which provide that the society shall also take, as further security for each advance in respect of which such a charge is given to the society, a guarantee given by an assurance company; and lastly (viii) a guarantee given in pursuance of a “continuing arrangement” *which conforms to the requirements of Part II of the Schedule to the Act*, being (except as otherwise provided in that Part) a guarantee supported by deposits of money made in pursuance of such an arrangement.

Of the various forms of permissible additional security enumerated in Part I of the Schedule, only the last calls for special comment at any length. But it may be well to note at this point, with regard to charges upon life policies when taken as part of the security for a building society loan, that section 2 (3) provides that where such a charge is taken *as additional security*, the value of the policy shall be assessed at an amount not exceeding the surrender value of the policy at the time when the advance is made.

This provision should not be misconstrued. As is well known, borrowing members of building societies frequently, when buying a house with the aid of an advance from the society, effect and include in the security policies on their own lives so as to ensure, in the event of their dying before the advance is paid off, that there will be the wherewithal to clear off the incumbrance and leave a house for their wives and families; a new policy, effected contemporaneously with the mortgage, will as a rule have no surrender value at all, or at most a surrender value equal to the amount of the first premium. The enactment does not, it would appear, operate to prevent the continuance of this reasonable practice; all that it seems to do in relation to such a case is to provide that the amount of the advance must be determined solely in relation to the value of the land included in the security, without any enhancement attributable to the inclusion of the charge of the policy. Where, however, it is not a new policy which is included, but one which has already acquired a surrender value, then in estimating the amount properly to be advanced on a mortgage of the land and the policy, the policy must not be valued higher than its surrender value when the advance is made.

Returning to "continuing arrangements", *alias* pool agreements, the Act provides (section 2 (4)) that where as additional security for an advance to a member the society take a guarantee under a continuing arrangement (except it be by a housing authority, as mentioned above), the advance is not to exceed 95 per cent. of the amount of the purchase price for defraying which the advance is made, the "basic advance" (see above) is not to exceed 75 per cent. of that amount, and the "excess advance" is not to exceed 20 per cent. of that amount. This appears to involve as a necessary consequence the borrowing member's finding at least 5 per cent. of the purchase price in cash, and prevents the society's risking, on the strength of a builder's guarantee, more than the difference between three-quarters of the value of the land (measured by the purchase price) and 95 per cent. of that value. It is to be hoped that this enactment, one of the most important features of the Act, will put a stop to a good deal of the wild-cat finance which has tended to get some building societies into bad odour, to the detriment of their more respectable brethren.

Guarantees under continuing arrangements (apart from those to which bodies of approved integrity such as housing authorities or insurance companies are parties) are not permissible at all in the future, as additional securities for advances by societies to members, unless the continuing arrangement in question conforms with the new statutory requirements. These are set out in Part II

of the Schedule; they are somewhat elaborate, and not easy to paraphrase in brief form. The requirements may be relaxed in certain circumstances when a government department, public utility undertaking or recognised housing society is concerned, and further relaxations are permitted when "certified houses" are the security for the advances, as to which see below; in other cases they are, in effect, that the arrangement must be so framed as to provide as follows:—

- (1) Each guarantee under the arrangement must secure to the society, on account of principal of the advance to which it relates, a sum not less than the amount by which the advance exceeds two-thirds of the purchase price for defraying which the advance is made, and also all other sums (apart from principal) which may accrue due to the society in respect of the advance—*e.g.*, interest, fines, etc.—before the sums repayable to the society on account of principal have been reduced to two-thirds of the purchase price. (Comparison should be made of the proportion of two-thirds in this condition with the proportion of three-quarters for the basic advance under section 2 (4), mentioned above.)
- (2) The guarantor is not to be released from liability under any guarantee until the principal sum remaining payable to the society of the advance in respect of which the guarantee is given is reduced to or below an amount equal to two-thirds of the purchase price.

The remaining conditions relate to the sums to be deposited with the society under the arrangement as backing for the guarantees. They provide as follows:—

- (3) The guarantor has to deposit, as backing for each of his guarantees, a sum equal, in the case of the first five guarantees, to the amount of the excess advance, and in the case of each subsequent guarantee, at least one-third of the excess advance. (The excess advance, it will be remembered, is the amount by which the actual advance exceeds what the society would consider a proper advance against security on the land if no other security were taken.)
- (4) Sums deposited and not withdrawn are not to be appropriated to the advances in respect of which each is deposited, but are to be pooled so as to form part of one fund which is liable as backing for all the guarantees under the arrangement outstanding for the time being, whenever entered into.

- (5) Finally, there is a condition, expressed with some elaboration, to prevent withdrawals of deposits under the arrangement which will reduce the total sum for the time being available as backing below the amount necessary for sufficiently securing performance of the liabilities outstanding.

The provisions as to additional security summarised above apply only, it should be noted, to advances by societies to their own members. When, after November 1, 1939, a society makes an advance on security of land to a non-member, it will, under section 4, have no power to take additional security at all. This is not merely a provision as to the valuing of the security taken; it is a positive prohibition.

Section 3 of the Act deals with the question of insurance policies effected for the purpose of facilitating the repayment of advances by the society to members. Power is, in effect, conferred upon societies to make to their members, by way of addition to advances on security of land, further advances of the whole or part of the sum necessary for providing a single premium on a policy of life assurance on the life of the member (or of a member of his family), to provide for the payment, after the death of the life assured, of the sums payable under the mortgage, including the additional sum attributable to the single-premium addition to the advance. Any additional sum so included in an advance can be disregarded when a question arises as to whether the amount of the advance was excessive, or as to whether the amount of any excess advance included in the advance exceeds the limit imposed by the Act. This provision is retrospective.

Section 5 introduces two new conceptions, "certified buildings" and "special continuing arrangements". A certified building is one as to which a certificate that it conforms to officially approved standards of building has been issued by an officially approved body the objects of which include the improvement of standards of building; it is a building as to which there is some sort of guarantee that it is decently built. A special continuing arrangement is one which provides that all the guarantees thereunder are to be given in relation to certified buildings and no others. In their application to special continuing arrangements the provisions in Part II of the Schedule, referred to above, are in some measure relaxed. The amounts in respect of each advance which have to be guaranteed are, for example, less than they are for an ordinary continuing agreement. It will remain to be seen whether the inducements to better building given by this section, taken in conjunction with the restrictions in relation to pool agreements referred to above,

will lead in practice to the provision of better houses; it is to be hoped they will. The dilemma of the Legislature is not difficult to deduce from this roundabout method of discouraging bad building; if too high a standard is insisted on, the provision may be discouraged of any new buildings at all of the cheaper type.

Section 6 imposes further restrictions in relation to advances where the society take as additional security guarantees under continuing agreements other than those to which housing authorities are parties. A period is fixed, which must not be exceeded, during which the payments under the mortgage are to be discharged; the period is twenty-three years from the date of the advance, in the case of advances to be made in the future, subject to this proviso, that in relation to advances made on or after July 1, 1940, under ordinary continuing arrangements (as opposed to the special continuing arrangements described in the last paragraph) the period is reduced to twenty years. There is a proviso also to prevent this section from operating so as to impose hardship on borrowing members.

The next provision of the Act to be noted is that in section 7 which is aimed at securing that borrowers shall know, before binding themselves, just where they stand, and shall not be able subsequently to plead that they have been misled. The provision in question renders the security unenforceable, except by leave of the Court, in any case where, on the purchase of a house, the society make an advance to a member, take any security for the advance from another person—as, *e.g.*, a guarantee under a pool agreement—and fail to give the member written notice in the official form (for which, see the Rules mentioned above) showing, among other matters, what is the maximum advance which the society would consider it proper to advance upon the house if no other security were taken. The notice must be given before the contract in relation to the loan becomes binding, and must state in terms by how much the advance proposed actually to be made exceeds what would be lent if there were no additional security from the third party; the nature of the other security has also to be clearly specified. It matters not whether the security to be taken from the third party is one which cannot be taken into account in determining the amount of the advance.

Section 8 of the Act tends, in a similar direction, towards the protection of purchasers. It enacts, in effect, that where there is in force any arrangement between someone financially interested in disposing of land and a building society, whereunder if the society make an advance to a purchaser larger than they would if no additional security were forthcoming, and someone other

than the purchaser may in respect of the advance provide the additional security, the purchaser may rescind his contract to purchase, and recover any deposit he has paid, unless before contract he has been given a notice (in Form 2 prescribed by the Rules) informing him of the existence of the arrangement. So also under section 9, which provides that when a society makes to a member an advance to enable him to buy a house they are to be deemed to warrant to him that the purchase price is reasonable unless, before the mortgage is completed, they give the member notice (Form 3 prescribed by the Rules) that no such warranty is implied; and in furtherance of this, the same section makes it an offence, punishable with considerable severity, for any person financially interested in disposing of land or erecting a building thereon by himself or his servant or agent to represent, without reasonable grounds, that the making of an advance by a building society implies that the property in question is sufficient security for the advance. This section calls for more examination than is here possible, owing to considerations of space; some interesting problems are not unlikely to suggest themselves to the student who carefully explores its implications.

It has long been well established as a principle of English property law that a mortgagee when exercising his power of sale under the mortgage is in no sense a trustee of that power for the mortgagor. A sale under the power at a gross undervalue *may* be evidence of fraud, so as to give rise to a remedy for the borrower who is damaged by the transaction; but apart from this, the lender is under no particular duty towards the borrower in respect of any exercise of the power of sale; he is in no way constrained, in the interest of the mortgagor, to sell only at the best price obtainable. The new Act, in section 10, cuts directly across this principle so far as building society mortgages are concerned. As regards such mortgages it is by the section in terms provided that it is the duty of the mortgagee—whether the society or a transferee from them—when exercising the power of sale to take reasonable care in exercising the power to ensure that the price is the best price that can reasonably be obtained; it is also further provided, in effect, that there can be no “contracting out” of this provision. There can, in the opinion of the present writer, be no doubt that this enactment is very onerous. That an anomaly is thereby introduced into the settled law relating to mortgages is not of itself necessarily a condemnation of the principle embodied in section 10; but this provision may well operate very harshly against building societies, having regard to the type of property with which they are as a rule concerned and the type of borrower, who will seldom be “good

for " costs, however careful the society may have been in exercising the power of sale. Nothing can be easier for a defaulting borrower who feels himself aggrieved by the sale of his house than to question whether at the sale the best price was obtained which was reasonably obtainable, or whether the society took proper care to ensure that it was such a price; the society may succeed in exonerating themselves entirely, but will probably have to bear, without hope of recoupment, the whole expense of doing so. Section 13 also contains provisions in relation to exercises of the power of sale, and should be studied.

The competition among societies for mortgage business has become so keen in recent times as to give rise to practices savouring of corruption; section 11 prohibits for the future, in connection with building society transactions, vails and gratifications which are detrimental to good business standards, and imposes very heavy penalties for transgressors.

Section 12 of the Act is aimed at ensuring that securities taken by building societies for their advances are adequately valued by skilled persons. The directors or managers of each society are made responsible for seeing that proper arrangements are made for this purpose, and records have to be kept, available to the auditors, to show that the responsibility has been properly discharged. Section 14 invalidates, for the future, but with necessary saving provisions, any attempts by the rules of a society or otherwise, to indemnify directors and managers, or officers, of a society against the results of negligence, default, breach of duty or breach of trust in relation to the society. Section 15 provides penalties for failure on the part of a society to comply with certain earlier provisions of the Act.

It is exceedingly improbable that at the present time there is any activity worth mentioning in the building society sphere of action; as in 1914, the building of dwelling-houses and the sale of small properties has come to a standstill. The result may well be that, when the clouds lift which at present encompass us, there will be another revival in the nature of a boom in building, and the value of this timely Act will then become apparent. The framers and draftsmen of this measure are to be congratulated on their handiwork.

THE LIMITATION ACT, 1939.

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[This article is written as if the Act were in force.]

In this article only those provisions of the Limitation Act, 1939, which are of interest to the conveyancer will be discussed. The statutes and general law relating to the limitation of actions have for many years required amendment and unification. This was recognised by Parliament when the 1925 property legislation was passed and was the reason for the inclusion of section 12 of the Law of Property Act, 1925, which provides that nothing in Part I of the Law of Property Act, 1925, which contains the general principles applicable after 1925 to legal estates, equitable interests and powers, affects the operation of any statute or of the general law for the limitation of actions or proceedings relating to land or with reference to the acquisition of easements or rights over or in respect of the land (a). The same reason accounts for section 8 of the Trustee Act, 1888 (b), which enabled trustees to plead the Statute of Limitations in certain circumstances, not being repealed by the Trustee Act, 1925.

Before the passing of the Limitation Act, 1939, which received the Royal Assent on May 25, 1939, and will come into operation on July 1, 1940 (c), the law relating to the limitation of actions was contained in about twenty statutes or parts thereof, all of which have been repealed (d) and in some cases re-enacted.

The Act, which consists of thirty-four sections and a Schedule of enactments repealed, is divided into three Parts. Part I contains the periods of limitation for different classes of action, Part II provides for the extension of the limitation periods in case of disability, acknowledgment, part payment, fraud, and mistake, and Part III contains a number of general provisions and definitions.

The most important change made by the Act is the abolition of the twenty-year period of limitation in the case of actions on a specialty and the substitution of a period of twelve years; in the case of actions of contract and tort there is but one period of

(a) But see *Re Landi*, [1939] Ch. 828 (C. A.).

(b) Repealed by Limitation Act, 1939, s. 34 (2).

(c) Limitation Act, 1939, s. 34 (4).

(d) The statutes repealed by the Limitation Act, 1939, are contained in the Schedule to the Act.

limitation, namely, six years (*e*), and the special periods that existed in the case of trespass to the person and slander have been abolished.

The provisions relating to actions to recover land, advowsons and rent are contained in sections 4 to 17 of Part I of the Act. Section 4 (3) of the Act provides that no action is to be brought by any person (*f*) other than the Crown or a spiritual or eleemosynary corporation sole to recover any land (*g*) after the expiration of twelve years from the date on which the right of action (*h*) accrued to him or, if it first accrued to some person through whom he claims (*i*), to that person. A proviso is added that if the right of action first accrued to the Crown or a spiritual or eleemosynary corporation sole through whom the plaintiff claims the action may be brought at any time before the expiration of the period applicable to the Crown or the corporation or within twelve years of the accrual of such right of action to the plaintiff, whichever period first expires.

The effect of section 4 is to preserve the period of twelve years which had been fixed by section 1 of the Real Property Limitation Act, 1874. Formerly an action by the Crown (*k*) or by any spiritual or eleemosynary corporation sole (*l*) to recover land was not barred till the expiration of sixty years from the date of the accrual of the right of action; but the Limitation Act, 1939 (*m*), has reduced this period to thirty years, except that in the case of any action by the Crown to recover foreshore (*n*) the old period

(*e*) Limitation Act, 1939, s. 2.

(*f*) An administrator is deemed to claim as if there had been no interval between the death and the grant of letters of administration: Limitation Act, 1939, s. 15, replacing Real Property Limitation Act, 1833, s. 6.

(*g*) "Land" includes corporeal hereditaments, tithes (except tithes belonging to a spiritual or eleemosynary corporation sole) and rentcharges, and any legal or equitable estate or interest therein, including an interest in the proceeds of the sale of land held upon trust for sale, but save as aforesaid does not include any incorporeal hereditament": Limitation Act, 1939, s. 31 (1).

(*h*) "References in this Act to a right of action to recover land shall include references to a right to enter into possession of the land or, in the case of rentcharges and tithes, to distrain for arrears of rent or tithe, and references to the bringing of such an action shall include references to the making of such an entry or distress": Limitation Act, 1939, s. 31 (5).

(*i*) "A person shall be deemed to claim through another person if he became entitled by, through, under, or by the act of that other person to the right claimed, and any person whose estate or interest might have been barred by a person entitled to an entailed interest in possession shall be deemed to claim through the person so entitled: Provided that a person becoming entitled to any estate or interest by virtue of a special power of appointment shall not be deemed to claim through the appointor": Limitation Act, 1939, s. 31 (4).

(*k*) Crown Suits Act, 1769, s. 1.

(*l*) Real Property Limitation Act, 1833, s. 29.

(*m*) S. 4 (1) and (2).

(*n*) "Foreshore" means the shore and bed of the sea and of any tidal water, below the line of the medium high tide between the spring tides and the neap tides": Limitation Act, 1939, s. 31 (1).

still applies. The reason for this reduction is that section 44 of the Law of Property Act, 1925, only enables a purchaser to investigate a title back to a root thirty years old, whereas before the Vendor and Purchaser Act, 1874, a purchaser could investigate a title back to a root at least sixty years old and hardship might be caused if a claim which arose before the period during which the title could be investigated was enforceable against the purchaser.

Sections 5 and 6 of the Act, which deal with the accrual of rights of action in the case of present and future interests in land, preserve the principle enacted in section 2 of the Real Property Limitation Act, 1874, that in the case of an interest in remainder or reversion the right of action is deemed to have accrued at the time at which the same becomes an estate or interest in possession (o). Sub-section 4 of section 6 has a curious and presumably unintended effect. It provides as follows:—

“6.—(4) No person shall bring an action to recover any estate or interest in land under an assurance taking effect after the right of action to recover the land had accrued to the person by whom the assurance was made or some person through whom he claimed or some person entitled to a preceding estate or interest, unless the action is brought within the period during which the person by whom the assurance was made could have brought such an action.”

Thus if a testator devises his real estate to trustees upon trust for sale and to hold the proceeds thereof upon the usual trusts in favour of his daughters and their issue, the position of a person who trespasses on such land will depend upon whether he entered upon the land before or after the executors have assented to the land vesting in the trustees. If he enters before the assent has been executed the trustees and beneficiaries who claim under the assent, which is an assurance within the sub-section, are barred from bringing an action to recover the land after the trespasser has been in possession for twelve years. But if he enters after the assent has been executed, section 7 (3) (p) of the Act applies and he will not acquire a title by adverse possession until all the beneficial interests have been barred.

Section 7 of the Act, which contains the provisions relating to settled land and land held on trust for sale, is a new section; but it re-enacts section 24 of the Real Property Limitation Act, 1833, to the extent that the provisions are applied to equitable

(o) “References in this Act to the possession of land shall, in the case of tithes and rentcharges, be construed as references to the receipt of the tithe or rent, and references to the date of dispossession or discontinuance of possession of land shall, in the case of rentcharges, be construed as references to the date of the last receipt of rent”: Limitation Act, 1939, s. 31 (6).

(p) See *infra*.

interests in land including interests in the proceeds of sale of land held upon trust for sale. Such a section was not suggested in the recommendations of the Law Revision Committee. As this section has been criticised in comments on the Act it is set out in full:—

“7.—(1) Subject to the provisions of subsection (1) of section nineteen of this Act (*q*), the provisions of this Act shall apply to equitable interests in land, including interests in the proceeds of the sale of land held upon trust for sale (*r*), in like manner as they apply to legal estates (*s*), and accordingly a right of action to recover the land shall, for the purposes of this Act but not otherwise, be deemed to accrue to a person entitled in possession to such an equitable interest in the like manner and circumstances and on the same date as it would accrue if his interest were a legal estate in the land.

“(2) Where the period prescribed by this Act has expired for the bringing of an action to recover land by a tenant for life or a statutory owner of settled land (*t*), his legal estate shall not be extinguished, if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land either has not accrued or has not been barred by this Act, and the legal estate shall accordingly remain vested in the tenant for life or statutory owner and shall devolve in accordance with the Settled Land Act, 1925; but if and when every such right of action as aforesaid has been barred by this Act, the said legal estate shall be extinguished.

“(3) Where any land is held upon trust including a trust for sale, and the period prescribed by this Act has expired for the bringing of an action to recover the land by the trustees, the estate of the trustees shall not be extinguished if and so long as the right of action to recover the land of any person entitled to a beneficial interest in the land or in the proceeds of sale either has not accrued or has not been barred by this Act, but if and when every such right of action has been so barred, the estate of the trustees shall be extinguished.

“(4) Where any settled land is vested in a statutory owner or any land is held upon trust, including a trust for sale, an action to recover the land may be brought by the statutory owner or trustees on behalf of any person entitled to a beneficial interest in possession in the land or in the proceeds of sale whose right of action has not been barred by this Act, notwithstanding that the right of action of the statutory owner or trustees would apart from this provision have been barred by this Act.

“(5) Where any settled land or any land held on trust for sale is in the possession of a person entitled to a beneficial interest in the land or in the proceeds of sale, not being a person solely and absolutely entitled thereto, no right of action to recover the land shall be deemed for the purposes of this Act to accrue during such possession to any

(*q*) See *post*, p. 188.

(*r*) “Trust for sale” has the same meaning as in the Law of Property Act, 1925: Limitation Act, 1939, s. 31 (1).

(*s*) See Limitation Act, 1939, ss. 4 (3), 5 and 6, *supra*.

(*t*) “Settled land”, “statutory owner” and “tenant for life” have the same meanings respectively as in the Settled Land Act, 1925: Limitation Act, 1939, s. 31 (1).

person in whom the land is vested as tenant for life, statutory owner or trustee, or to any other person entitled to a beneficial interest in the land or the proceeds of sale."

Section 16 of the Act, which replaces section 34 of the Real Property Limitation Act, 1833, provides that subject to the provisions of the above section and section 75 of the Land Registration Act, 1875, after the expiration of the prescribed period the title of the person whose right of action has been barred by the Act shall be extinguished.

Under the old law both trustee and *cestui que trust* could be ousted by the intrusion of a third party, and in such a case time began to run from the dispossession of the trustee and the *cestui que trust* (u). The law in this respect has been modified by subsections 2 to 4 of section 7, the effect of which is that the legal estate of the tenant for life, trustees or statutory owner will not be extinguished though their right of action may be barred, until the right of action of every person having a beneficial interest in remainder has been barred. Until all prior equitable interests are so extinguished, the adverse possessor (x) has only an equitable interest and does not become an estate owner. These provisions in effect extend the principles laid down in *Re Nisbet and Potts' Contract* (y) to safeguard the numerous interests which, since 1925, take effect only in equity. A purchaser, therefore, cannot accept a title acquired by adverse possession, unless it can be shown that such land was not previously settled land or land held on trust for sale, and an exception has been introduced to the principle of the 1925 legislation that a purchaser should not be concerned with equitable interests that can be overreached. There are no similar provisions in the case of settled chattels, and if the trustees fail to bring an action against a person who has converted such chattels within six years of such conversion their right of action will be barred and if there have been successive conversions their title will be extinguished even though there are persons interested in remainder (z).

Section 12 of the Real Property Limitation Act, 1833, enabled a tenant in common to acquire a title by adverse possession against a co-tenant, as possession by one was not deemed to be possession by the other; but this section only applied to interests in land, and as a tenant in common after 1925 only has an interest in the

(u) *Burroughs v. M'Creight* (1844), 1 Jo. & Lat. 290; *Bolling v. Hobday* (1883), 31 W. R. 9.

(x) The right of action does not accrue or continue unless there is adverse possession: Limitation Act, 1939, s. 10.

(y) [1905] 1 Ch. 391; affirmed, [1906] 1 Ch. 386.

(z) Limitation Act, 1939, s. 3 (2).

proceeds of sale, the section was held to be no longer applicable even though it was not repealed by the Law of Property Act, 1925, so that where a tenant in common was a trustee of the entirety no Statute of Limitations applied (a). Section 12 has not been re-enacted, and it appears that section 7 (5) of the Act prevents one tenant in common ousting another by adverse possession, as a tenant in common comes within the concluding words of that sub-section. Thus the position in such a case remains the same as it was before the passing of the Act.

Section 8 of the Act, which replaces the last branch of section 3 and the whole of section 4 of the Real Property Limitation Act, 1833, provides that in the case of forfeiture or breach of condition the right of action accrues on the date on which the forfeiture was incurred or the condition broken; and by virtue of the proviso to this section the right of action is not deemed to accrue to a person entitled to an estate or interest in reversion or remainder until his estate or interest falls into possession.

By section 9 (1) of the Act, which replaces section 7 of the Real Property Limitation Act, 1833, a tenancy at will is deemed to be determined at the expiration of one year from its commencement and the right of action of the person entitled to the freehold is deemed to accrue on the date of such determination. As in the previous Act no mention is made of payment of rent by a tenant at will; accordingly, if the sub-section is strictly construed the Act operates in favour of a tenant at will even though he has been paying rent during the whole of his tenancy. To avoid this difficulty it was suggested that all tenancies at will, whether rent was paid or not, were within section 7 of the Act of 1833 but subject to the provisions of section 35 of that Act, and that a tenant at will was an "other lessee" within the meaning of that section (b). This solution is no longer open to the Court, as, though the old difficulty has been preserved, section 35 of the Act of 1833 has not been re-enacted. This difficulty is not likely to arise, as in most cases a tenancy at will is turned by payment of rent into a tenancy from year to year (c), in which case section 9 (2) of the Act of 1939 applies and time begins to run under the Act from the date of the last receipt of rent. If the difficulty should arise, it is submitted that the Court would be unwilling to hold that the effect of sub-section 9 (1) of the Act of 1939 is to turn a rent-paying tenant into a freeholder and would either hold that this sub-section

(a) *Re Landi*, [1939] Ch. 828 (C. A.).

(b) See Derby and Bosanquet's Statutes of Limitation (2nd ed.), p. 345; Woodfall's Law of Landlord and Tenant (22nd ed.), pp. 283, 284.

(c) Woodfall's Law of Landlord and Tenant (22nd ed.), pp. 267 *et seq.*

does not apply to a tenant at will who pays rent (*d*) or that each payment of rent is an acknowledgment of the title of the landlord (*e*). Section 17 of the Act provides that no action may be brought or distress made to recover arrears of rent after the expiration of six years from the date on which the arrears became due. This section abolishes the distinction between the periods applicable to the recovery of arrears of rent due under a lease not under seal and a lease under seal. In the former case section 42 of the Real Property Limitation Act, 1833, applied and the period was six years, but in the latter case the action was for the recovery of a specialty debt and it was held that the twenty-year period applied (*f*). As already stated, actions on specialties must be brought within twelve years of the accrual of the right of action, but a proviso is added that the above provision is not to affect any action for which a shorter period of limitation is prescribed by the Act (*g*). Section 30 applies the Act to proceedings by or against the Crown (*h*), and accordingly the Crown has now only six years in which to recover arrears of rent as opposed to sixty years under the Crown Suits Acts, 1769 and 1861.

Actions to recover money secured by a mortgage or charge or to recover proceeds of the sale of land are now governed by section 18 of the Act and this section has made several important changes in the law. As regards mortgages of land the twelve year period of limitation for the recovery of the money remains unchanged (*i*). The same period applies to a foreclosure action in respect of mortgaged land, as although the provisions of section 18 do not apply to such an action the provisions already discussed relating to actions to recover land apply to such an action (*k*). The period of limitation in the case of an action to recover arrears of interest is now six years in all cases (*l*). Previously an action for interest due under a covenant in a mortgage deed was barred after twelve years, as in such a case section 8 of the Real Property Limitation Act, 1874, applied (*m*); if, however, the action was not based on a personal covenant section 42 of that Act applied and the period was six years.

(*d*) Lord St. Leonards, referring to s. 7 of the Act of 1833, said: "It seems to be assumed in this section that no rent is paid"; see "The New Statutes relating to Property" (2nd ed.), p. 53, n.

(*e*) See *Hodgson v. Hooper* (1860), 3 E. & E. 149.

(*f*) *Darby v. Tenant* (1885), 53 L. T. 257.

(*g*) Limitation Act, 1939, s. 2 (3).

(*h*) Including the Duchy of Lancaster and Duke of Cornwall: see s. 30 (3).

(*i*) S. 18 (1), replacing Real Property Limitation Act, 1874, s. 8.

(*k*) S. 18 (4). Under the old law the period was twelve years, as a foreclosure action was held to be an action for the recovery of land and to be governed by Real Property Limitation Act, 1874, s. 1: *Harlock v. Ashberry* (1882), 19 Ch. D. 539 (C. A.).

(*l*) Limitation Act, 1939, s. 18 (5).

(*m*) *Sutton v. Sutton* (1882), 22 Ch. D. 511.

In an action to recover money charged on a reversionary interest in land time did not run under the statute until the reversion fell in (n); but, where the reversionary interest was in the proceeds of sale of land, time ran from the date when the money became payable, with the result that the charge might be extinguished before the reversion fell in (o). This illogical distinction has been abolished, and the rule that formerly applied in the case of reversionary interests in land is retained and applied to reversionary interests in the proceeds of sale of land (p).

Before this Act if money was charged on personal property there was no period of limitation for the recovery of the principal or interest (q) nor for a foreclosure action in respect of such property. This gave rise to the unsatisfactory position that a lender on the security of a mixed fund of proceeds of sale of land and personalty might be statute barred in respect of the former part of the fund (r) but entitled to enforce his security against the latter part (s). This unsatisfactory position no longer remains, as now the same provisions (t) apply to mortgages of real and personal estate, with the following exception. If the lender has been in possession of the mortgaged personal property for twelve years the borrower does not lose his right to redeem, as section 12 of the Act (u), which bars a redemption action after the lender has been in possession of the mortgaged property for twelve years, only applies to mortgages of land. The reason for this exception is that it is usual for a person who lends money on the security of shares or other personal estate to take possession of such property; as the charge is often desired to last for an indefinite period, if section 12 of the Act were applied to mortgages of personalty, a bank with whom the borrower deposited bonds to secure his overdraft would have to acknowledge the title of the borrower to preserve his equity of redemption.

The Act provides that only six years' arrears of interest can be recovered; but there are two exceptions to this rule (x). If a subsequent mortgagee brings an action within one year of the discontinuance of possession by a prior incumbrancer he can recover all the arrears of interest that accrued during the period of possession by the prior incumbrancer although such period exceeded six

(n) *Hugill v. Wilkinson* (1888), 38 Ch. D. 480; Real Property Limitation Act, 1874, s. 2.

(o) *Re Witham*, [1922] 2 Ch. 413.

(p) Limitation Act, 1939, s. 18 (3).

(q) *Re Stucley*, [1906] 1 Ch. 67 (C. A.).

(r) *I.e.*, by Real Property Limitation Act, 1874, s. 8.

(s) *Re Jauncey*, [1926] Ch. 471.

(t) Limitation Act, 1939, s. 18.

(u) Replacing Real Property Limitation Act, 1874, s. 7.

(x) Limitation Act, 1939, s. 18 (5).

years (y). Where there is a term in a mortgage of a future interest or a life insurance policy that arrears of interest are to be treated as part of the principal sum the interest is not deemed to become due until the right to receive the principal sum has accrued (z). This provision is necessary as it would be unreasonable if time ran before the date when the parties contemplated that the interest would be paid. The Act also provides that in the case of such mortgages the right to foreclose shall not accrue to the lender until the future interest or life policy has matured or been determined (a). The object of this is to relieve a lender who is not in possession from having to enforce his security within the limitation period or else lose his rights, as it is not intended by the parties that a mortgage of a life insurance policy should be enforced before the policy has matured.

Sections 19 and 20 of the Act, which provide for the limitation of actions in respect of trust property and the limitation of actions claiming the personal estate of a deceased person, carry into effect the recommendation of the Law Revision Committee that the exception in section 8 of the Trustee Act, 1888, should be extended to trustees whether holding on express or constructive trusts including personal representatives. The terms "Trust" and "Trustee" are given the same meaning as in the Trustee Act, 1925 (b). Thus the Act has removed the anomaly that an executor or other person holding property upon a trust other than an express trust could plead the Statute of Limitations even though he retained the trust property or had converted it (c).

The new section avoids much of the difficulty which attended the interpretation of section 8 of the Trustee Act, 1888, by not re-enacting clause (A) of sub-section 1 of that section. Section 19 does not in terms confer the benefit of the statute on trustees, but, unlike the old section, expressly forbids a beneficiary bringing an action against a trustee after the lapse of the appropriate statutory period, or, if there is no such period, six years from the accrual of the right of action, unless the trustee has been guilty of fraud or has retained the trust property or converted it to his use.

Subject to the provisions of section 19 of the new Act in the case of property held upon trust, all claims to land or equitable

(y) Limitation Act, 1939, s. 18 (5), proviso (a).

(z) *Ibid.*, proviso (b).

(a) Limitation Act, 1939, s. 18 (3).

(b) Limitation Act, 1939, s. 31 (1).

(c) *Re Jane Davis*, [1891] 3 Ch. 119; *Re Lacy*, [1899] 2 Ch. 149; *Re Richardson*, [1920] 1 Ch. 423 (C. A.). Where the personal representative became an express trustee the Trustee Act, 1888, applied.

interests in land are barred within twelve years (*d*). Section 20 of the Act provides that claims regarding the personal estate of a deceased person shall likewise be barred within twelve years, and that claims to recover arrears of interest in respect of a legacy shall be barred the expiration of six years (*e*).

The provisions relating to disability, acknowledgment, part payment, fraud and mistake contained in Part II of the Act are applicable to claims concerning tort and contract as well as claims relating to land (*f*).

Time does not run against a plaintiff who is under a disability; in such a case the operation of the Act is suspended for a fixed period or until the disability is removed (*g*). Before the Act the provisions relating to disability were to be found in a number of statutes (*h*) and some statutes which imposed a period of limitation made no mention of disabilities (*i*). The provisions relating to disability are contained in section 22 of the Act and the meaning of disability is defined in sub-section 2 of section 31, which provides that for the purposes of this Act a person is under a disability while he is an infant, or of unsound mind, or a convict subject to the operation of the Forfeiture Act, 1870, in whose case no administrator or curator has been appointed under that Act. Thus the benefit of a disability, which had been enjoyed by convicts under sentence of penal servitude for treason or felony (*j*), until its abolition by section 10 of the Mercantile Law Amendment Act, 1856, has been restored to them.

In the case of actions which did not relate to the recovery of land, absence of the defendant beyond the seas was a disability (*k*), but in accordance with the recommendations of the Law Revision Committee this disability has not been retained.

Under the old law in the case of actions relating to land the only disabilities which were recognised were infancy and insanity, but the disability was of restricted operation; in the case of an infant or insane plaintiff the statutory period was suspended until six years after the removal of the disability (*l*), but subject to the provision that in no case was land to be recovered after thirty

(*d*) Limitation Act, 1939, ss. 4 (3), 5, 6, 7.

(*e*) Replacing Real Property Limitation Act, 1833, s. 42.

(*f*) Limitation Act, 1939, s. 1.

(*g*) Limitation Act, 1939, s. 22.

(*h*) Statute of Limitations, 1623; 4 & 5 Anne, c. 3; Civil Procedure Act, 1833; Mercantile Law Amendment Act, 1856; Real Property Limitation Acts, 1833 and 1874.

(*i*) Public Authorities Protection Act, 1893, and Law Reform (Miscellaneous Provisions) Act, 1934.

(*j*) Statute of Limitations, 1623, s. 7.

(*k*) Statute of Limitations, 1623, s. 7.

(*l*) Real Property Limitation Act, 1874, s. 3.

years had elapsed from the date on which the cause of action accrued (*m*). This period has been retained and extended to all cases where a cause of action relating to land or a charge on land is preserved by reason of a disability (*n*) and as already mentioned imprisonment is in certain circumstances regarded as a disability (*o*).

The provisions relating to acknowledgment which are of general application (*p*) are contained in sections 23, 24 and 25 of the Act. Section 23 preserves the principle which is to be found in earlier Acts (*q*), that on an acknowledgment or payment the right of action shall be deemed to have accrued on and not before the date of the acknowledgment or payment.

Section 14 of the Real Property Limitation Act, 1833, which was concerned with acknowledgments given to persons entitled to land or rent, provided that such acknowledgments must be in writing and signed by the person in possession of the land or in receipt of the rent. No provision was made for an acknowledgment by the agent of such person, though the section provided that the acknowledgment was to be given to the person entitled or his agent. As a result of this omission it was held in *Ley v. Peter* (*r*) that an acknowledgment in writing signed by the agent of a person in possession of the land or in receipt of the rent was insufficient. Section 7 of the Real Property Limitation Act, 1874 (*s*), which bars a mortgagor from bringing a redemption action at the end of twelve years from the time when the mortgagee took possession or from the last-written acknowledgment, provided for the receipt of an acknowledgment by the agent of a mortgagor but similarly omitted to provide that an acknowledgment might be signed by the agent of a mortgagee in possession.

This omission has been remedied by section 24 which, in addition to declaring that an acknowledgment must be in writing and signed by the person making it (*t*), provides that an acknowledgment may be made by the agent of the person by whom the acknowledgment is required to be made under the provisions of section 23 of the Act and may be received by the agent of the person whose title or claim is being acknowledged (*u*). An anomaly has been removed, because in an action to recover money charged

(*m*) Real Property Limitation Act, 1874, s. 5.

(*n*) Limitation Act, 1939, s. 22 (*c*).

(*o*) Limitation Act, 1939, s. 31 (2).

(*p*) Limitation Act, 1939, s. 1.

(*q*) Statute of Frauds Amendment Act, 1828, s. 1; Real Property Limitation Act, 1833, ss. 14, 42; Civil Procedure Act, 1833, s. 5; Mercantile Law Amendment Act, 1856, s. 13; Real Property Limitation Act, 1874, ss. 7, 8.

(*r*) (1858), 3 H. & N. 101.

(*s*) Replaced by Limitation Act, 1939, s. 12.

(*t*) S. 24 (1).

(*u*) S. 24 (2).

on land or rent, or under a judgment, or a legacy (*v*), or in an action to recover arrears of rent (*w*), an acknowledgment signed by the agent of the person by whom the money was payable was sufficient. An acknowledgment of a specialty did not have to be made by the person chargeable to the promisee or his agent (*x*), and so an acknowledgment in this case was held to be effective even though given to a third party (*y*). This distinction in respect of acknowledgments of specialty debts has not been retained and now in all cases an acknowledgment to a third party is ineffective as the Act provides that an acknowledgment must be given to the other party concerned or his agent (*z*). The same principles apply to part payment, which is a special form of acknowledgment.

Section 25 of the Act contains provisions relating to the effect of acknowledgments and part payments on third persons. An acknowledgment or part payment binds the person making it and his successors (*a*), but to be effective the acknowledgment must be made before the expiration of the period of limitation for the bringing of the action (*b*). Under the old law it was not clear in all cases whether an acknowledgment made after the statute had run was effective, for if the acknowledgment were given under section 14 of the Real Property Limitation Act, 1833, it was ineffective (*c*), but if given under section 8 of the Real Property Limitation Act, 1874, it was effective (*d*). The effect of such an acknowledgment given under section 42 of the Real Property Limitation Act, 1833, is uncertain as there is no authority on this point. Now it is clear that an acknowledgment made after the statute has run is only effective against the person making it and his personal representatives (*e*). Thus an acknowledgment by a tenant for life is in general binding upon the persons entitled in remainder, unless it is given after the expiration of the prescribed period (*f*).

(*v*) Real Property Limitation Act, 1874, s. 8.

(*w*) Real Property Limitation Act, 1874, s. 42.

(*x*) Civil Procedure Act, 1833, s. 5.

(*y*) *Moodie v. Banister* (1859), 4 Drew. 433.

(*z*) See Limitation Act, 1939, s. 24 (2), and *Batchelor v. Middleton* (1848), 6 Hare 75, at p. 83.

(*a*) Limitation Act, 1939, s. 25 (5) and (6). "In this section the expression 'successor', in relation to any mortgagee or person liable in respect of any debt or claim, means his personal representatives and any other person on whom the rights under the mortgage or, as the case may be, the liability in respect of the debt or claim devolve, whether on death or bankruptcy or the disposition of property or the determination of a limited estate or interest in settled property or otherwise": Limitation Act, 1939, s. 25 (8).

(*b*) Limitation Act, 1939, s. 25 (5).

(*c*) *Sanders v. Sanders* (1881), 19 Ch. D. 373 (C. A.).

(*d*) *Re Lord Clifden*, [1900] 1 Ch. 774.

(*e*) Limitation Act, 1939, s. 25 (5), proviso.

(*f*) *Gregson v. Hindley* (1846), 10 Jur. 383. The effect of this decision has been preserved in accordance with the recommendations of the Law Revision Committee.

An acknowledgment by one co-trustee of mortgaged property given to the mortgagee without the consent or knowledge of his co-trustee will not bind his co-trustee so as to prevent the operation of the statute (g). The same principle applies to a payment made by one of several trustees after the expiration of the period of limitation, but a payment made before the expiration of the period binds all persons liable in respect of the debt (h). Similarly an acknowledgment or part payment by one of several personal representatives binds the estate of a deceased person (i).

The position as regards the running of the limitation period in the cases of fraud and mistake has been clarified and the anomaly that existed under the old law has been removed. In the case of mistake the equitable rule that time only runs under the Statutes of Limitation from the time at which the mistake was or could with reasonable diligence have been discovered only applied to actions within the exclusive or concurrent jurisdiction of the Courts of Equity (k) and did not apply to actions which before the Judicature Act, 1873, would have been within the exclusive jurisdiction of the Courts of law (l). In the case of fraud owing to conflicting decisions (m) it was uncertain whether the equitable rule above mentioned applied to actions formerly within the exclusive jurisdiction of the Courts of law. The position is no longer uncertain as the effect of section 26 (n) is that the equitable rules as to fraud and mistake are to apply to all actions for which there is a period of limitation. By a proviso to the section a *bona fide* purchaser for value who was not a party to the fraud or who was unaware of the mistake is protected.

The equitable jurisdiction to refuse relief on the ground of acquiescence or otherwise is not affected by any of the provisions of this Act and a provision to this effect is contained in section 29 (o).

The new Act should be welcomed by the profession, if only because it has collected the law relating to the limitation of actions into one Act; but in addition it has, as already pointed out, removed a number of anomalies and has (if actions against public

(g) *Astbury v. Astbury*, [1898] 2 Ch. 111; Limitation Act, 1939, s. 25 (5).

(h) Limitation Act, 1939, s. 25 (6).

(i) Limitation Act, 1939, s. 25 (7).

(k) *Re Mason*, [1929] 1 Ch. 1 (C. A.); *Re Blake*, [1932] 1 Ch. 52.

(l) *Baker v. Courage*, [1910] 1 K. B. 56.

(m) In *Armstrong v. Milburn* (1885), 54 L. T. 27, affirmed *ibid.* 723, and *Osgood v. Sunderland* (1914), 111 L. T. 529, it was held that the rule did not apply, but in *Bulli Coal Mining Co. v. Osborne*, [1899] A. C. 351 (J. C.), and *Lynn v. Bamber*, [1930] 2 K. B. 72, it was held that the rule did apply to such actions.

(n) The provisions of Part I of the Act have effect subject to the provisions of Part II: Limitation Act, 1939, s. 1.

(o) Replaces with minor amendments Real Property Limitation Act, 1833, s. 27.

authorities and actions to recover land by the Crown are excepted (p)) reduced the periods of limitation to two, namely, twelve and six years. Stale demands should not be encouraged and the abolition of the twenty-year period is an improvement.

Though the Act has made many improvements in the law, it has so far as conveyancers are concerned taken a backward step by bringing trusts on to the title in all cases where a title acquired by adverse possession is offered. The adverse possessor will have to prove either that the land was not settled land or land held on trust for sale, or if it was settled land or land held on trust for sale that all the beneficial interests have been barred; in either case he will have great difficulty in showing a good title. It is submitted that the so-called curtain provisions of the 1925 legislation should not have been interfered with and that the Act should have provided that all the beneficial interests should be barred if the estate owner, whether a trustee, tenant for life or statutory owner, failed to bring an action to recover the land within the prescribed period.

(p) As to which see Limitation Act, 1939, s. 21.

SOLICITORS' COSTS ON A SUB-SALE.

By J. G. F. SCARR, M.A., LL.B., of Lincoln's Inn, Barrister-at-Law.

In cases where a solicitor acts for a purchaser of either freehold or leasehold land both during the purchase and also for the purposes of a resale to a sub-purchaser (the original purchase not being completed) the question often arises, where the sub-contract is expressed to be for the sale of the land, as to whether full scale charges can be made against the original purchaser under Part I, Schedule I, of the Remuneration Order of 1883 (as confirmed by the Order of 1936).

There are two possible grounds upon which such charges (apart from any question of charges for negotiating the sub-sale) can be made, namely :—

- (a) “ As purchaser's solicitor for investigating title . . . and preparing and completing conveyance (including perusal and completion of contract, if any) ”; and
- (b) “ For deducing title . . . and perusing and completing conveyance (including preparations of contract or conditions of sale, if any) ” on the sub-sale.

As regards the costs under paragraph (a), it appears that where the whole of the property is the subject of the sub-sale the solicitor cannot charge his client under Schedule I, but must charge under Schedule II, the reason being that the solicitor does not prepare and complete the conveyance to the sub-purchaser, *i.e.*, he does not do substantially the whole of the work for which the scale fee is provided by Schedule I, and this is essential : see *Re Lacey & Son* (1884), 25 Ch. D. 301. The solicitor must not only investigate title on behalf of the purchaser, but he must also prepare and complete the conveyance. Thus, in the case of *Re Romain*, [1903] 1 Ch. 702, the original vendor conveyed direct to the sub-purchaser, the purchaser joining in the conveyance in the usual way, the conveyance was not prepared by the purchaser's solicitor, and it was held that he could not therefore charge under Schedule I. Again, in the case of *Re Baillie* (1899), 15 T. L. R. 277, the vendor, one Cross, agreed to sell a house to one Emerson for £9,500. Emerson sub-sold the house to one Mawby for £9,700 and there was a subsequent resale by Mawby to the Chelsea Brewery. Messrs. Baillie & Co. alleged that they had acted as solicitors for Emerson as purchaser from Cross, and also as solicitors for Emerson as vendor to Mawby. The conveyance took the usual form of an

assignment by the original vendor to the ultimate purchaser, Emerson joining in the conveyance. The question arose whether the solicitors were entitled to the scale fee upon the purchase by Emerson and to another scale fee upon the sale by him to Mawby. The Court of Appeal held that as Messrs. Baillie & Co. did not prepare the assignment of the house to the Chelsea Brewery, they did not do the whole of the work for which the scale fee was provided by Schedule I, and that therefore they could only charge for the work they had done under Schedule II to the remuneration order. The question of a scale fee for acting as vendor's solicitors upon the sub-sale was not argued and was settled by consent.

The position, however, may be different where only a part of the property is sub-sold. Thus, in the case of *Re Read*, [1894] 3 Ch. 238, a solicitor was employed on the purchase of a plot of land for £2,550; he perused the contract on behalf of the purchasers and duly investigated the title. After the investigation of title part of the land was sold to a sub-purchaser for £1,800, and the solicitor, at the purchasers' request, delivered to the sub-purchaser an abstract of title consisting of the original abstract together with the statement of the equitable title of the purchasers. The transaction was carried out by two conveyances, one by the vendors, by the direction of the purchasers, of part of the land to the sub-purchaser for £1,800, the purchaser joining in the conveyance in the usual way, and the other by the vendors direct to the purchasers of the rest of the land for £750.

The solicitor alleged that he was entitled to a scale fee under Schedule I, for acting as purchasers' solicitor on the purchase by his clients of the whole of the land for £2,550. On taxation a scale fee was allowed on the £750 only, *i.e.*, on the land directly conveyed to the purchaser. However, on a summons to review the taxation, Mr. Justice Kekewich held that although the solicitor had not prepared the conveyance to the sub-purchaser, yet in substance the conveyance to the sub-purchaser was a conveyance to the original purchaser, and that as a purchaser is entitled (within certain limitations) to have the property conveyed as he pleases, and to whom he pleases, then if there is a sub-sale of a part, that conveyance can be regarded as a direct conveyance by the vendor to the original purchaser, notwithstanding that the estate may be vested in some person claiming under a sub-purchase. In the Judge's own words, the solicitor "has done whatever was necessary for the completion of the conveyance; he has in substance carried it through to the end. As it happens his clients have not required him to actually prepare with his own hands the conveyance to the sub-purchaser, because, according to custom, the

sub-purchaser prepared his own conveyance; but his clients were parties to the conveyance, and he had to peruse it and see that it was a proper conveyance by them to the sub-purchaser, not only by the original vendors, but by his own clients; and though in one sense he did not prepare it, I think in substance he did; and so far as he was relieved from doing so, he was only relieved by his clients desiring him to do it in a particular way."

This case was distinguished in the cases of *Re Baillie* and *Re Romain* (*supra*) on the ground that in *Re Read* only a part of the property was sub-sold. It is difficult to perceive what logical grounds there are for this distinction. However, on the authorities it would seem that the position now is that on a sub-sale of the whole, the scale fee cannot be charged, but on a sub-sale of part the scale fee can be charged if the facts fall within the decision of *Re Read*.

The second question which arises is whether the solicitor can charge the original purchaser the full scale fee under Schedule I for the work he has done as vendor's solicitor on the sale to the sub-purchaser, *i.e.*, charge for the work done under paragraph (b) above. In most cases the solicitor will not deduce title but will merely act as an intermediary between the vendor and purchaser, and in such cases, of course, costs can only be charged under Schedule II. There are, however, cases where it can be said that the solicitor has deduced title, and in such event there is no doubt that if substantially the whole of the work mentioned in paragraph (b) has been done, *i.e.*, if the solicitor has not only deduced title but also perused and completed the conveyance, then a full scale fee can be charged. In the normal case the solicitor will always peruse and approve the conveyance from the original vendor to the sub-purchaser on behalf of his client (and in which his client will join in the usual way) and the only question therefore which will generally arise is whether the solicitor has deduced title on behalf of his client.

For practical purposes the expression "deducing title" means delivering an abstract of title and verifying it by producing the title deeds for inspection, see *Southby v. Hutt*, 2 My. & Cr. 207. Whether the solicitor has deduced title is, of course, a question which is essentially one of fact, and no hard-and-fast rule can be laid down. Usually it will be found that the solicitor will not be able to deduce title since he will not have possession of the title deeds, or be in a position to answer requisitions himself. If the abstract has been delivered before the sub-contract is made, he will usually hand on the abstract to the sub-purchaser and leave him to settle questions of title direct with the vendor. Even if

he were to draw up a fresh abstract reciting the contract and answer requisitions himself by means of information gleaned from the vendor's solicitor, it would seem that the solicitor could only be regarded as an intermediary between the vendor and ultimate purchaser. In the case of *Re Romain (supra)* the solicitor besides claiming a full scale fee from the purchaser for investigation of title, claimed another full scale fee for deducing title and perusing and completing the conveyance on the sub-sale. The facts were that he had received the abstract from the original vendor, handed it on to the sub-purchaser, and acted in the same way with the requisitions when they came in. It was held that this did not constitute a deduction of title.

In the case of *Re Lacey & Son (supra)* the solicitors to the vendor, at the request of the purchaser, did not deliver an abstract to the purchaser, but merely perused and completed the conveyance on behalf of their clients. It was held that there had been no deduction of title and costs should be charged under Schedule II only.

The case of *Re Read*, the facts of which are set out above, is instructive. So far as this case relates to costs for deducing title it does not appear to be affected by the remarks made upon it in *Re Romain* and in *Re Baillie & Sons*, for in those cases the remarks made by the Court were merely directed to the question of whether the solicitor could charge a scale fee for investigating title and preparing and completing the conveyance on behalf of the original purchaser, and not to the question of vendor's costs on the sub-sale. In *Re Read* the solicitor to the purchaser delivered to the sub-purchaser an abstract consisting of the abstract furnished by the vendor, together with a statement of the equitable title of the purchaser. After completion he not only claimed a full scale fee on the £2,550 for acting as solicitor on the purchase, but claimed a further scale fee on the £1,800 for acting as vendor's solicitor on the sub-sale. The learned Judge held that there had been a deduction of title and pointed out that the fact that in that particular case the work was easy, was immaterial.

In short, the result of the above cases appears to be that where the solicitor to the purchaser delivers an abstract to the sub-purchaser (including a recital of the purchaser's contract) and is in a position to produce, or have produced, the deeds to verify the abstract and answer the sub-purchaser's requisitions himself, from his own knowledge of the title, and peruses and completes the conveyance in which his client has joined, he will be able to charge the full scale fee under Schedule I, and this whether the sub-sale is of the whole or only of part of the property.

PROBLEMS OF COMPULSORY AREAS.

By F. R. R. BURFORD, of the Inner Temple, Barrister-at-Law.

The *London Gazette* of May 13, 1938, contained the announcement that the Lord Chancellor had proposed that two Orders should be made for Compulsory Registration of Title. The first was in respect of the County Borough of Croydon, to take effect on January 1, 1939. The second was in respect of the County of Surrey, to take effect on January 1, 1940.

This was probably the most important step in the progress of Land Registration that had been taken up to that time. The proposal to extend Compulsory Registration to Middlesex had created little surprise. It had been regarded as probable ever since the report issued in 1930 by Lord Tomlin's first Committee on Land Registration, and as practically certain since the report of Lord Tomlin's second Committee, which was issued in 1935. But practising lawyers were not equally prepared for the proposed extensions to Croydon and the County of Surrey. The discussions that ensued revealed, amongst many other things, that the present situation in regard to Compulsory Registration was not nearly so well understood as it ought to be. In some quarters there exists a state of confusion that is almost grotesque.

That is certainly strange. Ever since the passing of the Land Registration Act, 1925 (called, for convenience, the Principal Act), lawyers were aware that the compulsory areas might be extended. Quite possibly, the comparative rarity of these extensions tended to make them forget the law and the practice concerning them. Section 120 (2) (a) and section 121 of the Principal Act allowed for extensions at the instance of a county council, but little advantage has so far been taken of these provisions. That method has been available from the outset, but section 120 (2) (b), which allowed Orders to be made otherwise than at the instance of a county council, prohibited any such Orders for a period of ten years from the commencement of the Principal Act. Is it unreasonable to suppose that during those ten years much was forgotten by practising lawyers of the rules and safeguards governing proposed extensions?

Whatever the cause, few would dispute the result. During the ten years of comparative calm, practising lawyers thought very little about the problems of compulsory areas. Even the bitterest

opponents of Land Registration did not worry seriously about possible extensions. They were looked upon as remote contingencies, not likely to affect the present generation of lawyers. A few might have reflected "*Après nous la déluge*", but lawyers in general felt that there were other and far more serious matters of concern. This was especially the case in districts far away from London.

As usual, extreme optimism had a violent reaction. The extension to Middlesex caused but little discussion; it had been long foreseen. But the proposed extensions to Croydon and Surrey were on a different footing. Even those lawyers who were favourably disposed to Compulsory Registration—and they are probably far more numerous than some imagine—regarded the proposals with misgiving. Many forgot the formidable safeguards provided by statute and by practical necessity.

In the case of Middlesex, few of the safeguards given by section 122 of the principal Act were called into play, as the proposed Order went through without serious opposition. But it would be all to the good if practising lawyers, *in all parts of the country*, would make a special study of section 122, and if they would realise the powers that can be exercised by the law society of a district which is proposed to be made a new compulsory area. They might also study the final sub-sections of section 122. Section 122 (xi) and (xii) have now ceased to operate, and there are no restrictions as to the number of Orders that can be made within a given time, so far as section 122 is concerned. It would be well if that fact were more fully realised.

It would also be advantageous to recall the recommendations of Lord Tomlin's First Committee on Land Registration. These were dealt with in an article on pp. 347—348 of vol. 69 of the *Law Journal*, which appeared shortly after the Committee had issued its report in 1930, and also in "A Conveyancer's Note-Book" on p. 4 of vol. 16 of *The Conveyancer*. Two paragraphs from the Report itself might be quoted.

"28. We contemplate as the ultimate goal a method of decentralisation by which England and Wales will be mapped out in large areas, each area administered by a local office, the London Registry providing for London, Southern England and the Home Counties, so far as its capacity will allow. It is not practicable or desirable at this stage to express a view as to the ultimate number of offices, including the London Office, that would be required, but ignoring for the moment the special position of Yorkshire, it should not, we think, much exceed six.

“29. The policy to be adopted in the immediate future should, in our judgment, be in the first instance to bring all additional areas to the London office, until the limits of its capacity are reached, or experience shows that a measure of decentralisation is called for. At that moment a local office should be established at a point which will be reasonably central for a considerable section of the country containing an existing compulsory area, so that the office may be available as the office of the whole of the section as and when the compulsory system extends over it, and for any voluntary registrations in the meantime made within it. This process can be repeated from time to time as circumstances require.”

The problem of the locality of the District Registry might be very delicate in some cases. The learned writer of the article on pp. 347—348 of vol. 69 of the *Law Journal* takes the case of Lancashire, and discusses the possible competition for the District Registry in that county. He suggests that the rival claims of Liverpool and Manchester might be settled by the selection of a third town, such as Preston. Further discussion on that point had better be left to natives of Lancashire!

The question of the situation of the District Registry for the Midlands has also led to strenuous argument. Birmingham, Nottingham and Northampton and others have been mentioned as possible candidates, when the time arrives. That may not be so far ahead as some imagine. The Solicitor-General announced in the House of Commons last June that the work of introducing Compulsory Registration was proceeding as fast as was practicable. The idea that a number of years would be allowed to intervene between each extension seems to have no foundation. Less than eighteen months elapsed between the date on which registration became compulsory in Middlesex and the giving of the preliminary Notices in respect of Croydon and the County of Surrey. “It will never happen in our time” is a specious form of self-consolation, and we would advise opponents of Compulsory Registration not to indulge in it.

But questions such as these are for the most part hypothetical. The wise lawyer will not concern himself too much with them, though they may lead to interesting discussions. Rather will he make himself thoroughly acquainted with Part XI of the Principal Act, which deals with Compulsory Registration, and in particular with section 122. He will also study such documents as the Reports of Lord Tomlin’s two Committees on Registration, which should have received far wider attention than they have done. He will read carefully the proposed Orders for future extensions, which

somehow still escape the attention of many lawyers, and he will realise that adequate means are available for those who wish any provisional Order to be opposed. Might it also be suggested that he should read learned articles on the subject carefully and in a constructive spirit, even if he does not agree with some of their contentions?

A close study of the relevant statutory provisions will show how impossible it is for an extension to be made suddenly and without sufficient warning. On the other hand, there is no object in delay if anyone wishes to object to a proposed extension. Further, it is not good policy to take an over-optimistic view of the safeguarding provisions. Many, for instance, made an unfounded assumption when the maximum period of eighteen months between the giving of the preliminary Notice and the Order coming into effect was abolished by section 1 of the Land Registration Act, 1936 (called the "Amending Act" for convenience). They assumed that the intervening period, in all future cases, would be far in excess of the eighteen months which had previously been the maximum. These optimists must have had a rude shock when Notices were given in regard to Croydon and the County of Surrey. In the case of Croydon the proposed intervening period was far less than eighteen months, and in the case of Surrey not greatly in excess of it. It should be realised that section 1 of the Amending Act merely abolished the maximum period, and that there are no real grounds, either in theory or in practice, for assuming that "years of warning" will be given in future cases. The very important *minimum* period of six months between the preliminary Notice and the final Order was left untouched by the Amending Act, and remains one of the greatest safeguards against what appears to be a common bogey amongst provincial lawyers—the fear of their districts being suddenly made into compulsory areas.

The wise lawyer will also bear in mind a fact that is often overlooked nowadays—there is more than one method of making a district a compulsory area. For some reason, it appears to be tacitly assumed that any future extensions will be made in accordance with section 120 (2) (b) of the principal Act, and that the requisite Orders will be made "otherwise than at the instance of a county council". Those who make this assumption certainly have some ground for it by reason of the small number of county councils which have taken advantage of the so-called "local option" provisions. Although the Land Transfer Act, 1897, allowed a county council to apply for compulsory registration in its own area, it was not until December, 1925, that an Order was made in

accordance with those provisions. When Eastbourne's example was followed after three years by Hastings, some imagined that the "local option" method would become common. But now it seems to be assumed that no further advantage will be taken of section 120 (2) (a) and section 121 of the Act, which provide for extensions at the instance of the county council concerned.

It may be, however, that this assumption is made too readily. This is one of the many questions in regard to Land Registration that only time can answer. It is as well, however, to realise that these questions still exist; and that one day they may be of great practical importance.

We have mentioned a few cases of misunderstanding in regard to the Principal Act. The Amending Act also, in spite of its brevity, has not received anything like sufficient attention from practising lawyers. It must be admitted that despite the keen interest that is taken in Compulsory Registration in some quarters, confusion over the subject is not diminishing. "It rather increases, Madam, than grows less." Indeed it might be said that at the moment there are more erroneous ideas on the subject of Compulsory Registration than on any similar branch of the law.

The problems of Compulsory Areas are likely to prove sufficiently difficult, as those areas are extended. It is most undesirable that those difficulties should be increased by ignorance of the law on the subject and of the recommendations of committees and other responsible bodies.

There is another, and a most important factor which increases the confusion and ignorance that exist in regard to extensions of the compulsory areas. When the extension to Middlesex was proposed in 1936, it took a long time before the legal profession in general realised the forthcoming change. Rumour is not a good foundation on which to base one's professional life, and many hoped that future proposals for extensions would receive far wider publicity when they were first made. In particular, it was hoped that legal journals would be able to give prominence to definite announcements of proposed extensions. But the proposed extensions to Croydon and Surrey took even longer to become known to the legal profession in general than the proposal to extend the system to Middlesex. We have endeavoured to show that there are ample provisions against hasty or unnecessary extensions, but there will not be complete confidence in these safeguards until proposals for extension are given the widest publicity, from the moment of the preliminary Notices being given to the county councils concerned. It is to be hoped that legal journals will, in future, be able to co-operate in disseminating the knowledge.

So much for the legal safeguards. At this time of day it should not be necessary to emphasise the practical checks on any hasty extension. The need for careful surveying of the proposed area is but one of these. There seems, indeed, to be no rational basis for the fears and confused notions commonly found in connection with the problems of Compulsory Areas. Whatever views we may hold about Land Registration—and there is still a marked division of opinion over the whole subject—nothing is to be gained by rumour and distortion. Lawyers who practise in the compulsory areas have not found Registration the bugbear that some gloomy legal prophets would like us to imagine. They have adjusted themselves to its workings in the same way as, some years ago, they adjusted themselves to the new property legislation. But the problems of Compulsory Areas need to be understood and to be studied carefully before practising lawyers can feel confident of their solution.

THE SETTLED LAND ACT "CURTAIN".

By MICHAEL ALBERY, of Lincoln's Inn, Barrister-at-Law.

In an article under the above title, appearing at p. 45 of the current volume of the *Solicitors' Journal* in the issue dated January 21 last, Mr. Withers puts forward with some diffidence what he described as some "hypercritical observations" on the "curtain" provisions of the Settled Land Act, 1925. I trust that I shall not be misrepresenting him if I attempt to recapitulate very shortly the main substance of his argument as follows. In doing so I gratefully avail myself of a "precedent" from his article, and state that "except where otherwise indicated all sections referred to in this article are those of the Settled Land Act, 1925".

Section 4 (1) provides that every settlement of a legal estate in land *inter vivos* shall, save as in the Act otherwise provided, be effected by two deeds, namely a vesting deed and a trust instrument, and if effected in any other way shall not operate to transfer or create a legal estate. Section 18 (1) provides (in effect) that where land is the subject of a vesting instrument and the trustees have not been discharged under the Act, any disposition by the tenant for life, other than a disposition authorised by the Act or any other statute or made in pursuance of any additional powers

mentioned in the vesting instrument, shall be void, subject to certain exceptions not material to be now mentioned. Section 117 (1) (xxxi) defines "vesting deed" as "the instrument whereby settled land is conveyed to or vested in or declared to be vested in a tenant for life or statutory owner". A vesting deed which infringes section 4 (1) or section 18 (1) does not convey land to a tenant for life or statutory owner. Such vesting deed is not therefore "the last or only principal vesting instrument" within the meaning of section 110 (2). A purchaser under such a vesting deed has not therefore the protection of section 110 (2) and will not get a good title. But in fact a purchaser is precluded from inquiring as to whether an apparently regular vesting instrument infringes section 4 (1) or section 18 (1). Any title taken under the Act may therefore be defective, however careful the investigation on behalf of the purchaser. Then Mr. Withers adds a paragraph in these terms: "Presumably the Courts will construe 'the last or only principal vesting instrument' as meaning 'a document being or appearing to be the last or only principal vesting instrument' or something to the same effect, and will similarly construe the other provisions of section 110, and will declare that section 4 (1) and section 18 (1) (which contain no provision in favour of a purchaser without notice) operate subject to section 110. If the Court does not do so, the matter will obviously have to be put right by legislation."

In matters of conveyancing Mr. Withers is graced with much of the impeccability of an angel; and where he has trodden so tentatively, it is no doubt risking the reproach of folly to rush too boldly in. Since, however, I take a rather different view both of the difficulties which he discusses and of the proper solution thereof, it may possibly contribute something to the elucidation of an intricate and not unimportant matter if I express my views thereon for what they are worth.

In examining or accepting a title a purchaser is concerned with two matters that can be readily distinguished. He is concerned to obtain the legal estate. He is further concerned to obtain it free from equities. I start with this proposition: section 110 has not, and indeed cannot by its terms possibly have any operation upon the legal estate in the land in question. There is nothing to be found in such section comparable to the provisions of the second paragraph of section 36 (6) of the Administration of Estates Act, 1925. Section 110 is designed solely to protect a purchaser from notice of equities. Upon this basis it becomes, I suggest, quite immaterial whether or not "the last or only principal vesting

instrument" means "a document being or appearing to be the last or only principal vesting instrument".

If the vendor has not the legal estate to convey to the purchaser, then neither prayers nor fastings nor even section 110 can avail the purchaser. But if the legal estate is conveyed to the purchaser, then he has a good title save only in so far as he is affected with notice of equities. Now a purchaser from a presumed tenant for life under an instrument that appears on the face of it to be a properly drawn vesting instrument but is not, has as a rule no express notice of the trusts affecting the land under the trust instrument in equity. Nor yet will he be concerned except in the cases specially provided by the Act, to inquire into such trusts in the course of investigating the title in accordance with the ordinary conveyancing practice. Can he not then rely upon section 199 (1) (ii) of the Law of Property Act, 1925, which provides (in effect) that a purchaser shall not be prejudicially affected by notice of any matter unless it is within his own or his advisers' knowledge, or would have come to his or their knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him or them? It is true, of course, that the purchaser will in most cases have express notice that there are trusts of some sort affecting the property. But so long as he has no express notice of the actual trusts, and moreover ought not reasonably to inquire into what those trusts are, then it is submitted that he can still claim to be a *bona fide* purchaser for value of the legal estate without notice of the trusts in question within the meaning of the above section. This may sound a rather fanciful distinction, but it should be recollected that in the ordinary case express notice of the existence of a trust is constructive notice of its contents. But special provisions such as those of section 110 may create an exception to the general rule. If this is correct, then it is entirely beside the point whether the spurious vesting instrument is or is not "a last or only principal vesting instrument" within the meaning of section 110.

There is perhaps just this further point. The spurious vesting instrument may not name the proper trustees to receive any capital money, and it is provided by section 18 (1) (b) that in such a case "a conveyance to the purchaser of the land shall only take effect under this Act if the capital money is paid to or by the direction of the trustees of the settlement or into Court". The important words here, however, are "under this Act". The section does not provide that in such a case the legal estate shall not pass to the purchaser. It merely provides that the protection afforded

by section 72 (2), whereby a conveyance "under this Act" is made to overreach the equities under the settlement, shall not apply. But for the reasons given above it is contended that a purchaser will on other grounds take free from such equities, and does not therefore in this particular type of case require the protection of section 72 (2).

So much then for notice of equities. It remains to consider under what circumstances, if any, a purchaser under what appears to be a proper vesting instrument may fail to acquire the legal estate in the land. Mr. Withers suggests four possible sets of circumstances whereunder by virtue of section 4 (1) a purchaser might fail to get a good title. With the greatest possible respect I would suggest that to none of such circumstances do the provisions of section 4 (1) apply. First, if no trust instrument affecting the land in question has been executed, then there is no settlement at all, and the very first essential for the applicability of the section is lacking. Then I do not think that Mr. Withers would seriously press his second suggestion that because section 4 (1) provides that a settlement must be effected by "two *deeds*, namely a vesting deed and a trust instrument", therefore the trust instrument must be under seal. The drafting no doubt lacks precision. But then throughout the new Acts of 1925 the brilliance of their conception and general framework presents a marked contrast with the detailed draftsmanship, which has a very fair share of the slovenliness and inelegance for which modern statutes are acquiring such a well-merited reputation. There is no logical reason for requiring a deed for the trust instrument, and the use of the phrase "trust *instrument*" and "vesting *instrument*" (see, for example, section 13) as opposed to "vesting *deed*" throughout the Act provides the strongest possible confirmation that "two deeds" is a slip for "two instruments". Nor does section 4 (3) which sets out the requirements of a trust instrument, including the stamps thereon, make any mention of the necessity for seal. In the third case put, where the trust instrument declares a trust for sale, there is again no settlement, and accordingly the section does not apply at all. The fourth and final suggestion is that the trust instrument may not have constituted any trustees of the settlement. But is it any the less a trust instrument for that? Section 4 (3) directs that the trust instrument shall appoint or constitute trustees of the settlement. It does not provide that if it fails to do so it shall not be a trust instrument. The only safe guide as to what is or is not a trust instrument within the meaning of section 4 (1) is to look at the definition in section 117 (xxxi).

There we find that, unless the context otherwise requires, in relation to settled land "trust instrument" means "the instrument whereby the trusts of the settled land are declared". In the absence therefore of any contrary provision—and section 4 (3) does not appear to be such a provision—it is fair to assume that any instrument declaring the trusts of the settled land is a "trust instrument" within the meaning of section 4 (1), whether or not it appoints trustees of the settlement. The purchaser therefore would obtain the legal estate in all four cases put by Mr. Withers.

I do not, of course, suggest that it would not be possible to concoct circumstances in which a purchaser under and upon the faith of an apparently regular vesting deed might by virtue of section 4 (1) fail to obtain the legal estate. For example, the declaration of trust might be verbal in order to evade stamp duty. The land would then be settled land, for section 53 of the Law of Property Act, 1925, merely provides that a declaration of trust of land must be *proved* by some writing. I should imagine, however, that the risk of such or similar cases must be very remote, and affords little cause for purchasers of settled land or their legal advisers to spend sleepless nights. The primary purpose of section 4 (1) seems to be to circumvent the creation of a settlement by a single deed conveying the legal estate and declaring the trusts at the same time.

Section 18 (1) presents, I think, more ground for alarm. It is, I suppose, possible that "a disposition authorised by this Act" might be construed as meaning "a disposition that upon the face of it conforms to the types of disposition authorised by this Act, whether or not it is authorised in equity". One argument against such a construction, apart from the fact that it is not what the words used in fact mean, is that it would give the sub-section an extremely limited scope, unless of course Mr. Withers is right in his suggestion that section 110 (5) may only apply to conveyances by personal representatives.

Another possible evasion of the consequences of section 18 (1) is to construe "void" as "voidable". There is ample authority for this construction of "void" as "voidable" in statutes. *Re Brall*, [1893] 2 Q. B. 381, decided on section 47 of the Bankruptcy Act, 1883, affords a good parallel, and numerous other examples will be found collected in *Maxwell on the Interpretation of Statutes* (7th ed.), pp. 181—186, and under the heading "void" in *Stroud's Judicial Dictionary*, while the general principle of this construction is discussed in *Churcher v. Martin*, 42 Ch. D. 312.

A further suggestion is made by the learned editors of *Wolsten-*

holme and Cherry's Conveyancing Statutes (12th ed.). Section 72 (1) provides that on a sale or other disposition a tenant for life may effect the transaction by deed "to the extent of the estate or interest vested or declared to be vested in him by the last or only vesting instrument". The editors comment: "These words show that even if the legal estate does not pass by reason of section 18, still the expressed grantee can make a title thereto to a purchaser: see section 110 (2)." Apparently reliance is placed on the words "declared to be vested in him", as showing that the tenant for life can convey a legal estate which he has not got. But throughout the Act the phrase "vested or declared to be vested" is regularly used to refer to the two cases of a vesting deed and a vesting declaration, where the legal estate is already vested in the tenant for life. With the greatest respect I do not think that this proposed construction will bear a very close examination.

On the whole, I suggest that the sub-section must be taken to mean what it says. I am unable to agree with Mr. Withers that if this construction is adopted "the matter will have to be put right by legislation". What is the extent of the danger? Simply this: that where land is already subject to a vesting deed, and where a further vesting deed is made upon or as if upon a change of tenant for life pursuant to section 7, then if the second deed is not in fact authorised under the Act, a purchaser will not get the legal estate. This will most often occur through a *bona fide* mistake. In such a case the risk of the purchaser is very slight. He has what appears on the face of it to be a good paper title conferring the legal estate, and he is unlikely to have any claim made against him before he or his successors have in fact acquired a good title under the Statutes of Limitation. It may, however, occasionally occur that a fraud is perpetrated upon the purchaser, and that the person retaining the legal estate may dispose of it to another *bona fide* purchaser for value. This is of course only likely to happen where the first purchaser has no right to call for the delivery of the title deeds. In such case the first purchaser will no doubt suffer unjustly. But somebody must suffer for the fraud. And why should the purchaser under a genuine and proper vesting deed be penalised rather than the purchaser under an unauthorised and spurious one?

There is this further argument. If section 18 (1) is to be twisted to mean something other than it says, then the protection afforded to the beneficiaries under the settlement by the provision for payment of any purchase moneys to the trustees of the settlement is rendered largely nugatory. A fraudulent tenant for life could convey the land to his wife as if pursuant to section 7 (5), and

the wife could make a good title and give a good receipt for the purchase money in reliance on section 110 (5). But if section 18 (1) is given its *prima facie* meaning, the wife would of course never acquire the legal estate.

It is after all no cause for recourse to Parliament that a purchaser should be able to accept what is apparently a watertight title only to find that it is bad. The legal estate might be outstanding because the vendor was an infant when the land was conveyed to him many years ago, but the purchaser may have no cause to suspect this. It is not so uncommon (though improper) for land to be conveyed to charitable trustees by a plain conveyance making no reference to the trusts. If the trust instrument is not then sent to the office of the Charity Commissioners pursuant to section 29 (4), the conveyance of the legal estate is presumably void under section 4 of the Mortmain and Charitable Uses Act, 1888. But the unhappy purchaser may accept a title under a supposed statutory trust for sale in ignorance of this. These are instances of the sort of hazards a purchaser has to face, and it is perhaps no matter for undue panic if section 18 (1) provides yet another. I do not believe that from a practical point of view the risk is very great.

To my mind it is a complete fallacy to suppose that because section 110 requires a purchaser to assume certain things, it therefore warrants that he will get a good title notwithstanding that such assumption prove false. Nobody would suggest that a purchaser whose title depended upon the correctness of a false recital more than twenty years old, must by some statutory miracle nevertheless obtain a good title. It is merely a matter of general conveyancing convenience, and hard cases are bound occasionally to arise. The moral for those of us who practice conveyancing appears to be an unfortunate one. It is that in an imperfect and uncertain world, where virtue and diligence do not always obtain their due reward, an absolute title registered at His Majesty's Land Registry has after all much to recommend it.

NOTES OF RECENT CASES.

1. CONVEYANCING AND REAL PROPERTY CASES.

Perpetuity—forfeiture clause.—*Re Spitzel's Trusts*, [1939] 2 All E. R. 266, requires only a short note by way of warning on drafting divestitive clauses. The facts are set out at length but briefly the testator gave his residuary estate upon trusts (*inter alia*) for his children for life subject to protective trusts, and after their deaths to such of their issue as they should appoint, and in default of appointment to such grandchildren as should attain twenty-one. The will then contained a clause that if any child or grandchild who should not have acquired an absolute interest in possession should forsake the Jewish religion then, as from the time when the fact of such event should be proved to the satisfaction of his trustees, such child or grandchild should forfeit his share, and the will contained a limitation over on defeasance. Bennett, J., held that this forfeiture clause was void for perpetuity because it could take effect beyond the rule.

It should be noted that no child or grandchild could take a vested interest in possession outside the rule because the children were lives in being and the grandchildren must attain twenty-one within twenty-one years from their deaths. The weakness of the forfeiture clause lay in the fact that it did not become effective upon the grandchild forsaking the Jewish religion but upon proof that this had occurred. This might happen at a period more than twenty-one years after the death of all the children and so was void. The forfeiture would have been valid had it operated immediately and not upon proof to the trustees. It will also be observed that this was a divestitive condition. Had it been a condition precedent to the vesting of the interest and had been so limited, though the wording would have necessarily been slightly different, it would have been valid, since the interest was limited to vest absolutely within the rule.

It is also suggested that the decision must not be taken to settle directly or indirectly the application of the perpetuity rule to determinable interests. In this case there was a clear limitation over and the perpetuity rule would apply as in the case of an executory limitation. Whether and to what extent the perpetuity rule applies to a determinable limitation in the nature of a fee deter-

minable must be regarded as open though it has been suggested that it does not: see *Re Chardon*, [1928] Ch. 464, and cf. *Re Talbot*, [1933] Ch. 895.

Power of appointment—fraudulent appointment—reappointment—severance.—*Re Chadwick's Trusts*, [1939] 1 All E. R. 850, contains a warning as well as a useful application of principle. The donee of a special power of appointment in favour of her children irrevocably appointed by deed in 1908 to her two sons a moiety of the fund, subject to her existing life interest, providing that if the younger did not attain twenty-one his share should pass to the elder. It appeared from the evidence that the appointment was made to enable the son who was *sui juris* to join in mortgaging his moiety to raise money for the payment of the donee's debts. After the death of the younger son, who had attained full age, the donee of the power executed a deed which recited these facts and that no irrevocable appointment had been intended to the younger son, and purported to revoke the appointment and appointed the whole fund subject to her life interest to the other son absolutely. Bennett, J., held that (i) the first appointment was a fraud on the power; (ii) that the appointment of a moiety to the younger son, who was not affected by the fraud, was not capable of being severed from the other appointment and so was also ineffectual; (iii) that the further appointment to the elder son could not be sustained without evidence that it was not tainted by the fraud which vitiated the other appointment; and (iv) that the property passed in default of appointment.

It is, of course, well-settled law that an appointment which is intended to benefit directly or indirectly the donee of the power will be a fraud on a power. It is enough to show that "the appointor's purpose and intention is to secure a benefit for himself or some other person not an object of the power": *per* Lord Parker in *Vacher v. Paull*, [1915] A. C., at p. 378; though where there is no evidence to this effect and the probable object is primarily to defeat the rights of the persons entitled in default this will not be a fraud: *Re Nicholson's Settlement*, [1939] Ch. 11. On the other hand a release of a power is not subject to the same rules governing fraudulent appointments: *Re Somes*, [1896] 1 Ch. 250. The facts in *Re Somes* (*supra*) were somewhat similar to the facts in this case except that the object of raising a mortgage was achieved by a release of the power, the objects of the power being entitled in default of appointment. While an interest in default of appointment is clearly more likely to be less valuable than an

actual appointment, even where, as is commonly the case with special powers, the objects are entitled in default, because there is usually at least a theoretical chance of increase in the class of objects, nevertheless this is the appropriate method where possible for carrying out the transaction envisaged by the case noted.

General words—section 62, L. P. A.—privilege or advantage.—*Le Strange v. Pettifor*, 161 L. T. 300, contains a short point of some interest on the application of section 62 of the Law of Property Act, 1925. The plaintiff was the owner of an estate at the seaside. The defendant was the lessee of one of the bungalows built on the estate. He was in the habit of parking his car on the metalled road outside his bungalow. The plaintiff built a car park and prohibited the parking of cars on the metalled road and charged for the use of the car park. It was not shown at the trial that the way was a highway but it was admitted that parking outside the bungalow had existed prior to the lease to the defendant. The defendant argued that this use was an enjoyment of a “privilege or advantage” which was impliedly granted by the demise. Luxmoore, L.J. (sitting as additional Judge) held that the right to park could not exist as an easement and that it could not constitute an “advantage or privilege” because it was not peculiarly enjoyed by the occupiers of the bungalow, but by anyone who wished to park the car there. It was an enjoyment in common with members of the public generally. Hence there was no implied grant, and, as there was no proof of the existence of a highway, the occupier of the bungalow was only entitled to use the metalled road for the purpose of ingress and egress to the bungalow, stopping no longer than was reasonably necessary for this purpose.

School Sites Act—reverter to the grantor—enrolment.—The decision in *Re Cawston's Conveyance* (noted *ante*, p. 80) has now been affirmed on appeal: [1939] 4 All E. R. 140. A conveyance made under the School Sites Act will revert to the grantor if the property ceases to be used for the purposes of the Act, even although the grantor had received a full valuable consideration. The point was not dealt with whether the right of reverter is a legal interest under the Law of Property Act, 1925, s. 1, but this seems to have been assumed. The conveyance creates a fee simple absolute for the purposes of the 1925 legislation: see Law of Property Act, 1925, s. 7, and it seems now to be assumed that such a grant does not constitute settled land, although it is

according to the old principles a statutory fee determinable. As a fee determinable the estate reverts in the grantor at the date when the property ceases to be used for the purposes of the Act without any entry on the part of the grantor. This may be very material in connection with the time from which a period of adverse possession may run for the purposes of the Limitation Acts.

The Court of Appeal also held that a conveyance under the School Sites Act did not require to be enrolled as a conveyance for charitable purposes, at least if made after 1871, by reason of the Public Parks, Schools and Museums Act, 1871, and the view was expressed that any conveyance made under the School Sites Act, of whatever date, was exempted from the general provisions of the Charitable Uses Act, 1735.

Emergency legislation—“unable immediately to do so by reason” of the war.—Though not primarily concerned with conveyancing, attention may be drawn to the decision *A v. B*, [1939] 4 All E. R. 169, where the Court of Appeal had to consider the circumstances in which the Court would exercise its discretion to refuse the enforcement of a judgment. The matter remains a question of discretion and of the peculiar circumstances of each case. A hire-purchase company, whose business was much affected by the war, applied for an exercise of discretion on the ground that, though it might have the money to meet this particular, there were other creditors and the enforcement of the judgment might have a detrimental effect on the company. The Court of Appeal refused on the evidence before it to allow the discretion to be exercised. The Court directed that if the matter was to be referred back for further evidence to be adduced the money must be paid into Court. The latter point may be very material in practice, where an application is made to adduce further evidence, if the Court is not satisfied on the first application.

The Court of Appeal held that on the one hand it was not acting as a quasi Court of Bankruptcy and in the interests of the creditors generally, but on the other hand the mere fact that the debtor could meet the particular demand did not entitle the Court to refuse the application. The word “unable” must be construed in a “reasonable and common-sense way”, and the existence of other debts may be relevant, though the weight to be attached to them may vary very much in different cases.

It is felt that the existing decision has not gone far, but gives some indication of the proper approach to such an application.

Perpetuities—several of interests in a class gift—condition subsequent and failure.—*Re Morrison's Will Trusts*, [1939] 4 All E. R. 332, is an interesting example of the effect of a condition imposed on gifts by will. By her will a testatrix created a trust fund in favour of A for life with remainder to her children who should attain twenty-one or if daughters attain that age or marry. The will contained a proviso that if any legatee should embrace the Roman Catholic faith the legatee's interest should cease and, if a life interest, should forthwith become part of the residuary estate. At the death of the testatrix A was living and had a daughter B and two sons C and D. Subsequently A and her daughter B embraced the Roman Catholic faith but the two sons did not. Bennett, J., held that (i) the whole interest was forfeited by reason of the life tenant having embraced the Roman Catholic faith, and (ii) the proviso was not void for perpetuity because B, C and D were all alive at the death of the testator.

The first point was decided by the learned Judge without citing any authority, and without giving any reasons. It was purely a question of construction upon the precise terms of the will and would seem to be dependent upon the following words: "if any such benefit [within the proviso] be a life interest the *fund* out of which such life interest is payable shall fall into and shall forthwith form part of my residuary estate": the italics are those of the writer. In the face of such words it is thought, with respect, that no other interpretation is possible. If the fund out of which A's life interest was payable was to fall into residue forthwith it is difficult to see how the interests of C and D could survive. It is improbable that such an interpretation gives effect to the intentions of the testatrix, but the point is mentioned primarily to indicate the dangers in drawing such provisoes.

The second point was one of greater substance. The argument was that, as A could have children after the death of the testatrix who could embrace the forbidden faith at a period beyond the perpetuity rule, the whole proviso must be invalid in respect of this gift. The learned Judge held, however, that as B, C and D were in existence their shares could be subject to the proviso, which would have been invalid in respect of other shares. The general rule with regard to class gifts is that if a contingency affects any member of the class which prevents the ascertainment of the whole class, the whole gift fails: *Pearks v. Moseley* (1880), 5 App. Cas. 714. A class gift cannot partially fail. This case, however, is an example of a later construction to be found in *Re Game*, [1907] 1 Ch. 276, where a superadded direction imposed upon the interests of girls, members of a class, a restraint on anticipation,

and it was held that in respect of those members of the class who were girls and born in the testator's lifetime their interests were subject to the restraint, but the interests of those who were not so born were not : "the condition here is one which does not apply to the class as a whole (*i.e.*, not to sons), but only to the individual members of it" ([1907] 1 Ch., at p. 280). For his decision Bennett, J., relied on an older case (*Re Russell*, [1895] 2 Ch. 698), where the limitation was in remainder for all daughters of the tenant for life, with a proviso settling the share on any daughter. It was held that as there was only one daughter who was born in the lifetime of the testator she took the interest subject to settlement.

The result of these cases may be said to be that if a class gift is subject to a proviso superadded to the gift which can be applied to the individual shares, this proviso may be good in part and bad in part. The view of this particular will taken by the learned Judge appears to have been that the proviso was to be construed as a superadded direction which could be applied to individual shares.

It is submitted with respect that this decision goes further than the decision upon which the learned Judge relied or than *Re Game* (*supra*). In those cases the question depended purely upon a superadded direction which, if invalid, would not have defeated the interests taken by the beneficiaries. In the case noted the condition also operated as a condition precedent because any future member of the class might have become a Roman Catholic before he had attained twenty-one and so obtained a vested interest. It must be remembered, however, that the aspect of the proviso operating as a condition precedent could only take effect within the perpetuity period. In the event of any children being born subsequently it might be interesting to discover whether the proviso could be treated as valid as a condition precedent, but invalid so far as concerned such children as a condition in defeasance of their vested interest. The question, having been clearly raised, will, we think, give rise to further judicial decision.

Contract for sale—written memorandum:—Smith-Bird v. Blower, [1939] 2 All E. R. 407, is an interesting illustration of what may constitute a sufficient memorandum of a contract for sale of land. The defendant entered into negotiations with the plaintiff's agent Mr. Brown for sale of the property. The defendant thought that the agent was acting for himself but in fact

he was acting for his daughter, the plaintiff. As a result of the negotiations the defendant gave the agent a written note intended to be handed to the defendant's solicitors as follows: "Let bearer, Mr. Brown, have property 74 and 76 Midland Road, Ellistown, for £510. D. Blower." He subsequently wrote to his solicitors: "Re 74 and 76 Midland Road, Ellistown. In reply to yours of the 22nd instant, I beg to confirm that I gave Mr. Harry Brown a note of authority to convey the above property to him for £510. I further note that you will let me know when you wish me to come over to complete." Subsequently, the defendant refused to continue with the sale. Luxmoore, L.J. (sitting as additional Judge) held that the first note was not a sufficient memorandum, because though it mentioned the name of the agent, identified the property and named the price it did not in terms refer to any agreement for sale, but he held that the letter was a sufficient memorandum and was not protected from discovery because it was not written for the purpose of obtaining legal advice: *O'Rourke v. Darbishire*, [1920] A. C. 581. He held that it was immaterial that the plaintiff's name was not mentioned, because the defendant thought that the agent was acting as principal: *Lovesy v. Palmer*, [1916] 2 Ch. 233.

2. WILL CASES.

By S. J. BAILEY, Barrister-at-Law.

Will—bequest during widowhood—subsequent marriage annulled.—A testator bequeathed property to his wife and son upon trust for the wife "during her life or widowhood", and subject thereto upon trust for the son absolutely. Some years after the testator's death, his widow decided to marry again. Accordingly, she and the son assumed that her beneficial interest in the property would end on her re-marriage. She therefore agreed to a sale of the property, and allowed the son to take the proceeds of sale. Twelve years after her second marriage, she obtained a decree absolute of nullity on the ground of the husband's incapacity. She now claims that, the second marriage being a nullity, her interest in the property had never determined. This problem came before Farwell, J., in *Re Eaves, Eaves v. Eaves*, [1939] Ch. 1000. He held that her widowhood had never determined, but that it would be inequitable to allow her after a delay of twelve years to call upon the son to replace a trust fund in the dissipation of which she herself, as co-trustee, had acquiesced. On appeal, *ibid.*,

[1939] W. N. 388; [1939] 4 All E. R. 260, this decision was affirmed on somewhat different grounds. The basis of the judgments in the Court of Appeal appears to have been that had the son made an application to the Court, when the widow re-married, for a transfer of the fund to himself, the Court would have granted that application irrespective of any considerations as to the possibility of some future annulment of the marriage; and, when the Court has made such an order, it will not subsequently re-open the transaction in the event of an annulment of the marriage. Similarly, where a transfer of the fund occurs by agreement of the parties (without an order of the Court), the transaction will not subsequently be re-opened.

Will—construction—bequest to vicar and churchwardens “for parish work”—failure for uncertainty.—A trust which is unduly vague fails for uncertainty. Thus, in *Re Stratton*, [1931] 1 Ch. 197, the Court of Appeal held that a gift to the vicar for the time being of a certain parish, “to be by him distributed at his discretion among such parochial institutions or purposes as he shall select”, was invalid. Were such a gift restricted to ecclesiastical purposes within the parish, it would create a valid charitable trust which the Court can enforce. Moreover, if the purpose of a trust is not specified, the Court may seek to ascertain the testator’s purpose by considering the office held by the trustees he has specified. Thus, in *Re Garrard*, [1907] 1 Ch. 382, a bequest to the vicar and churchwardens for the time being of a specified parish, “to be applied by them in such manner as they shall in their sole discretion think fit”, was held (being framed as a bequest to the ecclesiastical officers of the parish) to create a good charitable trust for *ecclesiastical* purposes in that parish. The most recent decision on this topic is *Farley v. Westminster Bank*, [1939] A. C. 430, affirming the decisions of the Court of Appeal and of Luxmoore, J. (noted *ante*, Vol. II, p. 164, *sub nom. Re Ashton’s Estate*). Here, however, the bequest was to the vicar and churchwardens of a specified church “(for parish work)”. By using the words “for parish work”, the testatrix had herself indicated the purposes of the trust: consequently, it was not permissible to construe the trust as one restricted, by the official character of the proposed trustees, to ecclesiastical purposes within the parish. In the Court of Appeal, Clauson, L.J. (dissenting), felt able to hold that the words “for parish work” merely signified that the vicar and churchwardens were to apply the legacy for *their* parish work—meaning thereby that they, the ecclesiastical officers of the parish,

must use it for their work as such. This construction, however, did not find favour elsewhere. The natural meaning of "parish work" was held to comprise the whole of the ordinary activities of the parish—not merely *ecclesiastical* work within the parish. Consequently, since the will showed no indication that the testatrix used the words in a restricted sense, the gift failed for uncertainty.

Will—construction—determinable annuity—"until he shall become bankrupt"—effect of obtaining discharge in bankruptcy during executor's year.—When a will confers an interest determinable upon the legatee's bankruptcy, the Court ordinarily assumes that the testator's object was to ensure that no part of the legacy should pass to the legatee's creditors in the event of his bankruptcy. Consequently, although the testator may have used words of futurity (e.g., "until he shall become bankrupt", etc.), the legacy may be held to be determined by a bankruptcy which existed before the testator died and which continued after his death. If, however, the legatee's bankruptcy is *annulled* after the testator dies and before any payment has been made in respect of the legacy, the legacy does not determine unless, on the facts, it can be said that any part of it was "payable to or retained for or appropriated for the benefit of" the legatee: see *Re Forder*, [1927] 2 Ch. 291 (C. A.). The question whether a similar rule should be applied when a bankrupt legatee obtains a *discharge* in bankruptcy before his legacy has become payable has now been decided by Luxmoore, L.J., in *Re Walker, Public Trustee v. Walker*, [1939] Ch. 974. Here an annuity of £250 was expressed to be payable to the annuitant "during his life until he shall . . . become bankrupt," etc. The annuitant applied for his discharge in bankruptcy on the day before the testator died; but the order then made suspended his discharge for one month. Although nothing was legally payable in respect of the annuity until the expiration of the executor's year, the annuity (had it not been determinable) would have vested immediately in the annuitant's trustee in bankruptcy by virtue of section 38 (a) of the Bankruptcy Act, 1914. Moreover, a discharge in bankruptcy, unlike an annulment under section 29 (2), would not operate to revest the annuity in the annuitant. Consequently, the decisions as to the annulment of a legatee's bankruptcy were held to be inapplicable to the case of a discharge. The annuity, therefore, was held to have determined, and passed accordingly as prescribed by a gift over contained in the will.

Will—construction—“ securities ”—“ money ”.—In its primary meaning, the word “ securities ” denotes only any debt or claim the payment of which is in some way secured—e.g., by a right to resort to some fund or property for payment. In *Re Smithers, Watts v. Smithers*, [1939] Ch. 1015, Crossman, J., was invited to hold that a bequest of two-thirds of the proceeds of sale of “ my securities ”, contained in a home-made will, should be construed to include all the investments of the testatrix. Although the learned Judge agreed that evidence of contemporary usage is admissible (in addition to dictionaries and other sources) in construing the meaning of a word, and that the word “ securities ” is commonly used as a synonym for investments or property dealt with on the stock exchange, he held that the word must bear its primary meaning unless there is something to displace it. Accordingly, the bequest was held to include government bonds and stock (secured on the revenues of the governments concerned), but not preference stock and shares in certain companies. The will also gave a pecuniary legacy to A, and concluded with a bequest to B of “ the remainder of the money ”. The printed form, upon which the will was made, began with a direction that “ all my just debts and funeral and testamentary expenses shall be paid as soon as conveniently may be ”. The gift of “ the remainder of the money ” was, therefore, held to mean the property out of which such debts, etc., and the pecuniary legacy had first to be paid—i.e., the whole of the residuary personal estate. The primary meaning of the word “ money ” was thus displaced, following earlier decisions such as *Re Mellor*, [1929] 1 Ch. 446, to a like effect.

Will—secret trust—communication to legatees—legacy subsequently increased.—When secret trusts are imposed upon a legacy, the legacy may either give no indication that a trust is intended or may state, without specifying the beneficiaries, that the legatee is to hold upon trust. Secret trusts of the latter type were considered by the House of Lords in *Blackwell v. Blackwell*, [1929] A. C. 318; and the principles enunciated in that case have now been applied in *Re Colin Cooper, Le Neve-Foster v. National Provincial Bank*, [1939] Ch. 580; [1939] Ch. 811, C. A. A legacy of £5,000 was bequeathed to A and B “ upon the trusts which I have already communicated to them ”. Before executing his will, the testator had in fact verbally communicated the desired trusts to A and also to X whom he charged with the duty of communicating them to B (who was abroad at that time). X made a

memorandum of the stated trusts, and subsequently communicated them to B. There was no doubt that both A and B accepted the trusts in the testator's lifetime. Although the trusts had not in fact been "already communicated" to both trustees at the date when the will was made, this point does not appear to have been considered by the Court. This may indicate that, on analogy to *Russell v. Jackson*, 10 Ha. 204, a prior communication to one of two joint legatees is regarded as a prior communication to both: perhaps, also, it may indicate that the Court was reluctant to lend further weight to the theory which has been derived from *Blackwell v. Blackwell*, that no secret trust communicated *after* the date of the will can be imposed upon a legacy bequeathed expressly upon trust. Nevertheless, *Re Keen*, [1937] Ch. 236, C. A., shows that a secret trust which is inconsistent with the terms of the legacy to the trustees cannot stand: it was therefore arguable here, it seems, that the trust in the present case had not in fact been communicated to A and B in the manner set forth by the legacy and that it was therefore inoperative.

The attention of the Court was directed chiefly to another point. Immediately before he died, and without the knowledge of A and B, the testator had made a further will, whereby he expressly revoked the former will and concluded: "The sum of £5,000 bequeathed to my trustees in the will now cancelled is to be increased to £10,000 they knowing my wishes regarding this sum." The Court of Appeal held that these words, whether they be construed as adding to and preserving from revocation the £5,000 legacy or as a legacy of £10,000 to replace a revoked legacy of £5,000, left an effective trust of the £5,000. To the additional £5,000, however, no secret trust attached; for, as to this additional sum, the necessary factors of "communication, acceptance or acquiescence, and the making of the will on the faith of such acceptance or acquiescence" (p. 818) were lacking.

3. LANDLORD AND TENANT CASES.

By LIONEL A. BLUNDELL, LL.M., Barrister-at-Law.

Covenant to expend £500 a year in repairs or pay the difference in cash—whether difference damages or debt.—The case of *Moss' Empires, Ltd. v. Olympia (Liverpool), Ltd.*, has already been referred to in these notes, on the occasion of the trial before Hilbery, J. (54 T. L. R. 575; *The Conveyancer*, Vol. 2 (N.S.), p. 382). The judgment of Hilbery, J., was reversed by a majority

of the Court of Appeal (Slesser and MacKinnon, L.JJ., Greer, L.J., dissenting; 54 T. L. R. 956), but has now been restored by the House of Lords (55 T. L. R. 924), which has reversed the decision of the Court of Appeal.

The lessees covenanted that in the performance of certain covenants they would "expend during each year of the said term on such repairs and decorations a sum of £500" and at the end of each year produce to the lessors evidence of such expenditure or "pay to them at the end of each year a sum equal to the difference between the amount so expended and £500".

Nothing substantial having been spent on repairs for several years, the lessors brought an action claiming the difference between what had been spent and the total sum which should have been spent on the basis of £500 for each year. The House of Lords held that the sum claimed was not damages for breach of covenant, but debt. The covenant allowed the lessees an alternative: they could fulfil their contract either by spending £500, or by spending a less sum and paying the difference between what they had spent and £500. It therefore followed that the Landlord and Tenant Act, 1927, s. 18 (1), had no application, and the lessors' claim was not limited to the diminution in the value of the reversion.

The covenant moreover touched and concerned the thing demised, so that it ran with the land and bound assignees of the lease.

Breach of covenant to pay all assessments and outgoings—landlord able to recover apportioned sum from tenant although he has not discharged it himself at time of action brought.—Under a covenant by the tenant to pay all rates, taxes, assessments, duties, impositions and outgoings whatsoever imposed or charged on the premises, the landlord can recover from the tenant the sum apportioned on the demised premises in respect of street works under the Private Street Works Act, 1892, although he has not, at the time of the issue of the writ, been obliged to disburse that sum himself. The amount is a charge on the premises and the tenant's covenant is in effect to relieve the premises of the charge. This principle has been re-affirmed in the recent case of *Francis v. Squire* (1939), 56 T. L. R. 161.

No implied obligation on landlord as to safety of demised premises.—*Davis v. Foots* (1939), 56 T. L. R. 54, is an unfortunate

instance of the hard rule of English law that a landlord is not liable to his tenant for defects in the premises demised rendering them dangerous or unfit for occupation, nor for personal injury to the tenant caused by such defects, though the landlord may have constructed the defects himself or may be aware of their existence (*Woodfall*, 24th edition, p. 714, and cases there cited). In this case the landlords had removed a gas-fire which the incoming tenants did not want, but the landlords made no provision for stopping up the end of the pipe; when the new tenants had the gas turned on and moved in they were poisoned by gas, with the result that the husband died and the wife was seriously ill. It was sought to found on the statement by one of the lessors that she would have it [the gas-fire] taken out, an undertaking to do that work for the tenants, in which it might be implied that they would do the work with reasonable skill and care. The Court of Appeal rejected this contention on the ground that there was no undertaking to do any work for the tenants, the removal of the gas-fire being for the lessors' own purposes. The claim for damages accordingly failed on this ground also.

Demolition—whether an “improvement” within section 3 of the Landlord and Tenant Act, 1927.—The case of *National Electric Theatres, Ltd. v. Hudgell* (1939), 55 T. L. R. 424, shows that in a proper case the entire demolition of all the buildings comprised in a holding, and the erection of new buildings in their place, not necessarily of the same kind or for the same purpose as those demolished, may be an improvement to the holding within section 3 of the Landlord and Tenant Act, 1927, so as to enable the tenant to claim compensation for the improvement under that Act.

Housing Act, 1936, s. 2—“rent not exceeding £40”.—In section 2 (1) of the Housing Act, 1936, which implies in every contract for letting a house for human habitation at a rent not exceeding £40 in the county of London and £26 elsewhere “a condition that the house is at the commencement of the tenancy, and an undertaking that the house will be kept by the landlord during the tenancy, in all respects reasonably fit for human habitation,” the expression “rent” means the true or net yearly rent arrived at by deducting the appropriate sum for rates from an inclusive rent. This has now been held by the Court of Appeal

in *Rouson v. Photi* (1939), 56 T. L. R. 237, approving the *dictum* of Lewis, J., in *Jones v. Nelson*, [1938] 2 All E. R. 171, which is cited as the authority for the above construction of the section in *Woodfall* (24th edition) at p. 717.

Option to purchase contained in lease—position of lessee who gives notice to exercise option but fails to complete.—In *Cockwell v. Romford Sanitary Steam Laundry, Ltd.* (1939), 56 T. L. R. 185, the lessees were given an option to purchase in the form that if the lessees should at any time before June 24, 1938, give to the lessor six calendar months' previous notice in writing of their desire to purchase the fee simple, the lessor would, upon expiration of such notice and upon payment of £2,000 with interest at 5 per cent. per annum from the expiration of such notice until completion of the purchase and of all rent up to such expiration, assure the premises to the lessees for an estate in fee simple.

It was held by the Court of Appeal that when notice exercising this option was given to the lessor prior to June 24, 1938, a binding contract to purchase came into existence, and that after the expiration of the six months the tenancy was terminated by the express provision of the clause giving the option, the relationship between the parties being changed from that of lessor and lessee and becoming that of vendor and purchaser. In arriving at this construction the Court of Appeal placed particular reliance on the fact that by the clause giving the option the person exercising the option became a debtor for the purchase-money upon the expiration of the six months, and was from that date to pay interest on it instead of paying rent as tenant under the lease.

This case must be treated as one of construction, decided upon the words of the particular option before the Court; which accounts for the very fine line of distinction between this case and *Weston v. Collins* (1865), 34 L. J. Ch. 353. In *Weston v. Collins* the option clause said nothing about payment of interest on the purchase money between the expiration of the notice and completion of the purchase, and it was held that there was no contract between the parties unless and until the purchase price was paid.

The chief lesson to be learnt from *Cockwell v. Romford, etc., Laundry* is therefore that an apparently small distinction between two covenants which are broadly similar may give an entirely different twist to their construction when the covenants are considered as a whole for the purpose of discovering their true meaning and intent. Caution must be exercised in applying the

decision to the facts of another case, particularly where it may not be clear, from the terms of the option, that the tenancy is automatically to be determined at the expiration of the period of notice.

It may be noted, in passing from this case, that an option to purchase does not run with the land (*Woodall v. Clifton*, [1905] 2 Ch. 257; 74 L. J. Ch. 555 [C. A.]), but here "the lessees" were defined as including successors and assigns and all other persons deriving title under the lessees, so that assignees of the lease who took also an express assignment of the benefit of the option were enabled to exercise it.

Relief to lessee's mortgagees under Law of Property Act, 1925, s. 146.—A lessor claiming to forfeit a lease for breach of covenant is not obliged to give notice to mortgagees of the tenant by sub-demise. In *Egerton v. Jones* (1939), 55 T. L. R. 1089, Sir Wilfrid Greene, M.R., has pointed out the risk which a mortgagee of leaseholds accordingly runs of the lessor re-entering for breach of covenant without the knowledge of the mortgagee. This case has already been noted from the conveyancing angle at p. 87 of this volume of *The Conveyancer*.

Rent Restriction Acts—definition of "dwelling-house"—house let subsequently to passing of 1920 Act.—The Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, applies by section 12 (2) to "a house or a part of a house let as a separate dwelling" which satisfies certain conditions. In *Schaffer v. Ross* (1939), 56 T. L. R. 126, the Court of Appeal (Slesser and Luxmoore, L.JJ., and Atkinson, J.) has held that this definition is not limited to houses let as separate dwelling-houses at the time of the passing of that Act, but applies to houses subsequently let. So where a house within the rateable value limits of the 1920 Act was occupied by the owner at the time of the passing of that Act and was first let in 1928, it was held that the Act of 1920 applied to the house. Slesser, L.J., said: "I can find nothing in the Act of 1920 to limit section 12 (2) to a house let as a separate dwelling-house at the time of the passing of that Act—namely, July 2, 1920."

This should be compared with the Court of Appeal decision in *Brooks v. Brimcome*, [1937] 2 K. B. 675. That case involved the definition of "dwelling-house" in section 16 (1) of the Act of 1933, whereby "'dwelling-house' has the same meaning as in

the principal Acts, that is to say, a house let as a separate dwelling or a part of a house being a part so let". It was held by Slessor, L.J., and Simonds, J., in the Court of Appeal, that a dwelling-house which was not let as a separate dwelling at the date of the passing of the 1933 Act did not come within the above definition. Simonds, J., expressed this point of view in the words (p. 688): "Now the 1933 Act defines a dwelling-house as 'a house let as a separate dwelling', and that must mean, in my view, a house which is so let at July 18, 1933, the date on which the Act came into force. Therefore, in order to know whether any particular house is a dwelling-house within the meaning of the sub-section one has to ask whether it can be treated as being so let at that date. If it is so let then it is a dwelling-house within the meaning of the Act; if it is not so let then it is not a dwelling-house within the meaning of the Act."

In *Schaffer v. Ross* the only attempt to distinguish the somewhat contrary ruling in *Brooks v. Brimcome* was the observation of Slessor, L.J., that when the provisions of section 12 (2) of the Act of 1920 are contrasted with section 2 of the Act of 1933, "one's attention is immediately called to the fact that there is no limitation in section 12 (2) of the Act of 1920 to houses let 'at the passing of the Act'." But neither is there any such limitation in section 16 (1) of the Act of 1933, which is really the section to be compared with section 12 (2) of the Act of 1920. If section 2 of the Act of 1933 has any real bearing on the meaning of "dwelling-house", it would seem actually to confuse the position further by suggesting that there can be such a thing as a dwelling-house within the meaning of the Act of 1933 which was not let as a separate dwelling immediately before the passing of that Act, though according to *Brooks v. Brimcome* it must have been so let at the date of the passing of the 1933 Act if it is to be a dwelling-house within the meaning of that Act.

Altogether the position is confusing and very much in need of clarification. At present the Court of Appeal decisions indicate that a dwelling-house within the meaning of the Act of 1920 need not necessarily have been let at the date of the passing of that Act, but that a dwelling-house within the meaning of the Act of 1933 must have been let at the date of the passing of the 1933 Act.

It must be pointed out that the above observations are directed purely to the definition of the expression "dwelling-house". Apart altogether from the definition of "dwelling-house" laid down in *Brooks v. Brimcome*, it must be remembered that a dwelling-house can only be controlled under the Act of 1933 if it is a dwelling-house to which the Acts applied immediately before the

passing of that Act or then formed part of such a dwelling-house (section 1 (2)), and the registration provisions apply only in respect of a dwelling-house let as a separate dwelling immediately before the passing of that Act (section 2 (2)). The like observations apply in respect of the Act of 1938.

Rent Restriction Acts—actual possession by handing over of key—mistake in date in application for registration.—The case of *Holt v. Dawson* (1939), 55 T. L. R. 976, illustrates two points in connection with decontrol by actual possession under the Acts of 1923 and 1938. The key was handed over to the landlord's agent for the express purpose of decontrolling the house and was then handed to the new tenant. This was held both by the County Court Judge and by the Court of Appeal to have given the landlord actual possession during the brief interval of time that the agent held the key. In filling up the form of application for registration of the house as decontrolled, however, under section 4 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1938, the landlord by mistake inserted the wrong date as the date of decontrol. This was held not to invalidate the application, the material fact being the making of the application in the prescribed form.

THE LIBRARY.

The Solicitors' Handbook of War Legislation. By S. M. KRUSIN, B.A., and P. H. THOROLD ROGERS, B.A., B.C.L., Barristers-at-Law. London: Sweet & Maxwell, Ltd.; Stevens & Sons, Ltd.; Solicitors' Law Stationery Society, Ltd. 1940. lx+836 pp. (£1 10s. net.)

The Emergency Legislation has descended upon practitioners in a succession of waves so incessant as to overwhelm them. Many practitioners who, in the first weeks of the war, determined to collect from H.M. Stationery Office all the Statutes, regulations and orders which were issued have long since abandoned the attempt to put and keep in their right places the material collected piecemeal. Moreover, copies of Acts and orders when collected singly appear to have a habit of disappearing from their "last known place of abode". Indeed, on many occasions this reviewer has been reminded of the well-known lines in "The Hunting of the Snark"—

"They sought it with thimbles, they sought it with care;
They pursued it with forks and hope."

Now that trouble is over. Messrs. Krusin and Rogers have collected together all the Emergency Acts, regulations and orders which the practitioner is likely to require (for the moment) in one large volume which it would be difficult to lose, except by reason of theft, or of loan or other negligent act!

The collocation of the Acts and orders, with a very good index, is of considerable assistance to the profession.

But an even greater service has been rendered by the authors. The Acts and orders have been grouped under suitable headings such as "Landlord and Tenant", "Commerce", etc., and each group is preceded by an illuminating note explaining the general effect of each of the various Acts within the group. There is, for example, a useful note on the Landlord and Tenant (War Damage) Act, 1939, in which the authors have considered certain points which arise under that Act. In passing it should just be mentioned that the authors' observation at p. 94 that the case of *Enlayde v. Roberts*, [1917] 1 Ch. 109 is to be treated as overruled by *Upjohn v. Hitchens*, [1918] 2 K. B. 48, is open to doubt. The reviewer would, however, agree that if the matter comes before the Courts again it is to be hoped that a more benevolent and commercial view will be taken of an unqualified covenant to insure against fire. Meanwhile, *Enlayde v. Roberts*, *supra*, should be regarded as a trap against which practitioners should protect their clients.

When one considers the short period within which the authors have prepared this work it is surprising that they have found it possible to submit both the new Acts and the legislation and decisions during the last

war to so close and critical a scrutiny. Instances might be multiplied but space permits only of two examples.

(1) At p. 705 the authors point out that the draftsman of the Compensation (Defence) Act has omitted to provide for compensation in respect of (*inter alia*) (a) prohibition of the doing of work on land; (b) prohibition of the moving of chattels; (c) a direction to transfer goods to the Board of Trade or a disposal of them by the Board. Such a prohibition or direction may be made under certain of the Defence Regulations; and it is the authors' view that in such cases the only remedy of the subject will be by means of the rather expensive procedure of a petition of right (p. 710, note (d)), unless a claim can be set up under some other Statute or rule, a point which is fully considered at pp. 707, 708.

(2) It is pointed out at p. 227 that although during the last war payments could lawfully be received from enemy aliens, the cases which established this proposition, *e.g.*, *Halsey v. Lowenfield*, [1916] 2 K. B. 707, and *Seligman v. Eagle Insurance Co.*, [1917] 1 Ch. 519, cannot be relied on having regard to the distinction between the legislation of the Great War and the Trading with the Enemy Act, 1939. Under section 1 (2) of the last-mentioned Act the receipt of money from an enemy alien is permissible only if the payment is made in respect of a transaction under which all obligations of the payee have been performed before the commencement of the war. But for this purpose the subjects of enemy States residing in England and registered under the Aliens Restrictions Orders are not enemy aliens, but are *sub protectione Regis*, and enjoy the (perhaps doubtful) privilege of suing as freely and as often as they wish provided that they do not claim under a contract which involves trading with the enemy, or is otherwise unlawful.

These examples may seem trivial, but they are taken more or less at random, solely with the object of illustrating the detailed care and thought brought by the authors to the task of examining the practical effect and implications of the new Acts and orders. Apart from the general notes preceding the text of the Acts the various sections (which are printed in bold and clear type) have been carefully annotated and many cogent and practical observations will be found in those annotations. This book deals with the position up to the end of November, 1939. Statutory Rules and Orders appear still to be flowing freely and no doubt further Statutes will be passed. The authors propose to deal with these by timely supplements. It is to be hoped that these supplements will be of the cumulative type, so that it will not be necessary to refer to a series of additional volumes. The appendices to the present volume might well be included in the supplement, as (although duly indexed) they may hereafter escape notice.

The reviewer has only observed in the whole of this large work one solitary typographical error, namely, the misspelling of the word "Guinness" at p. 94. Whether the compositors and proof-readers are teetotal or not they are evidently "stout fellows" and deserve a word in praise of their "goodness". The authors and the publishers are to be congratulated on the production of a work which should, and will, prove of great service to the profession.

E. O. WALFORD.

Loose-Leaf War Legislation. Edited by JOHN BURKE, Barrister-at-Law. London: Hamish Hamilton (Law Books), Ltd. (Price for 12 parts and binder £3 net.)

The advantages of the loose-leaf system for a publication of this nature are obvious. At the time of writing the work is not complete, and it is felt that it is better to defer detailed examination until later. For the present it suffices to say that eleven parts are so far issued, comprising all the Acts of Parliament so far passed, and the majority of the rules and orders, the whole comprising 678 pages. Part 12 will contain the indexes and revision pages.

The Law of Stamp Duties. By E. G. SERGEANT, LL.B. Hamish Hamilton (Law Books), Ltd., 90 Great Russell Street, W.C.1. xliii and 351 pp. (15s.)

The only other substantial work on Stamp Duties which is in general use is *Alpe*. It has not been possible to compare this work fully with *Alpe*, but its form is very similar, and in some respects the material is almost identical. It must be remembered that it is impracticable to apply to such a subject a distinctive style, and it is probable that however many books are written on this subject they will all appear very similar so long as the subject is dealt with by reproducing the Stamp Act, 1891, section by section with notes on each section.

There is one new and welcome feature in this book—an Introduction containing some general observations concerning such matters as the interpretation of statutes, imposing charges upon the subject, and the effect of altering an instrument after its execution. It also contains certain information regarding fines and penalties. It may not be generally known that, strictly, a purchaser, lessee or mortgagor who fails to stamp his purchase deed, lease, or mortgage is liable to a fine of £10 in addition to the (maximum) penalty of £10 which can be charged over and above the *ad valorem* stamp duty. Moreover, even a person who prepares or is employed in preparing an instrument chargeable with duty as a lease (i) of any dwelling-house or part of a dwelling-house for a term not exceeding one year at a rent not exceeding £40 per annum, or (ii) of any furnished dwelling-house or apartments for any definite term less than a year (except letters of correspondence) becomes liable to a fine of £5 if the lease in question is not duly stamped. Solicitors should bear this in mind!

At p. 131 the author deals with the duty on licences and the test to be applied in order to determine whether the document is in fact a lease or a licence. The law appears to be correctly stated; but perhaps the more recent cases of *Daly v. Edwardes* (1900), 83 L. T. 548 (and, on appeal, (1901), 85 L. T. 650); *Frank Warr & Co., Ltd. v. L. C. C.*, [1904] 1 K. B. 713; and *Clore v. Theatrical Properties, Ltd. and another*, [1936] 3 All E. R. 483, might have been added to the authorities cited as establishing that the essential question is whether exclusive possession is given.

It remains to be seen whether this work will replace *Alpe*. There seems, upon a brief comparison, to be little to choose between the two works. Many firms will no doubt wish to have both works, as stamp duty

problems are of such importance whenever a substantial consideration is involved.

The author is a solicitor in the office of the Solicitor of Inland Revenue, and it may therefore be assumed that the work is, as it appears to be, the product of practical experience and not of mere theoretical knowledge. The index is good and exhaustive, and the special table of *ad valorem* duties at pp. 290, 291 will afford a very ready means of determining the duty payable in respect of conveyances, leases, mortgages and certain other documents.

This work is absolutely up to date and includes a reference to the Prevention of Fraud (Investments) Act, 1939, regarding relief from duty under section 10 (8) of that Act.

E. O. WALFORD.

Theobald on the Law of Wills. Ninth edition. By J. H. C. MORRIS, B.C.L., M.A., of Gray's Inn, Barrister-at-Law. London: Stevens & Sons, Ltd., and Sweet & Maxwell, Ltd. 1939. lxxxii and 842 pp. (Price £2 2s. net.)

The appearance of this new edition of *Theobald on Wills* is an event of importance. The book is now reduced both in price and in bulk; and its usefulness has not diminished. Indeed, the introduction of a more succinct system of case-reference in the text, together with the format now adopted, have made it more readable; and even the student will no longer be alarmed by its dimensions. The learned editor, adhering in the main to the concise method of treatment typical of earlier editions, has managed to reduce the text by some 300 pages. The preface relates that about 3,000 of the older cases, many of them from Ireland, have been eliminated, and that some 350 new cases decided since 1927 have been included. A great deal of unnecessary matter has thus disappeared; and the precedents and statutory will forms, which were included among the appendices of the preceding edition, are now omitted. Presumably, no special significance should be attached to the fact that this edition, unlike its more unwieldy predecessors, is not entitled *A Concise Treatise*: nevertheless, there are welcome signs that the present editor has not felt himself bound to adopt a somewhat over-concise method of treatment which occasionally tended, in past editions, to present the reader with a list of cases and leave him to extract from them possible refinements upon the broad propositions enunciated in the text. Thus, the treatment of Secret Trusts (pp. 64—66) now includes both a quotation from *Blackwell v. Blackwell* and a reference to a legal periodical; and nearly half a page is devoted (p. 692) to a comment upon *Re Thompson*, [1936] Ch. 676, which appeared to hold that residuary personalty is still liable before residuary realty for the payment of pecuniary legacies and perhaps for debts also. The few lines given to *Re Chardon* (p. 488) are rather less helpful perhaps—*e.g.*, the term “gift over” hardly reveals the possible analogy to a determinable fee; but the reader is referred for further information to a standard work on Charities and to two articles in a legal periodical.

There has been little alteration in the general arrangement of the chapters and of the book as a whole. A new chapter (pp. 80—82) has been added, outlining the Inheritance (Family Provision) Act, 1938. Chapter 34

still gives the full treatment formerly accorded to *Shelley's Case* and to rules (such as *Wild's Case*) concerned with informal words of limitation creating an entail, adding summaries of sections 130 and 131 of the Law of Property Act, 1925. Some further explanation of the effects of the new law might be helpful here—*e.g.*, by cross reference to, and some slight expansion of, the section on “bequests of personalty with words of limitation” in Chapter 36. Reference to the Table of Statutes has been facilitated by giving each statute its date: in the next edition, perhaps, an improvement in the same direction might usefully be made in the General Index, by introducing an alphabetical arrangement of its sub-headings. Since Theobald does not customarily deal with Statutes of Limitation (*e.g.*, Trustee Act, 1888, s. 8), the new Limitation Act, 1939, will not necessitate any important adjustments.

There is no doubt that this new edition of Theobald's authoritative work will receive a ready welcome. It is in no wise inferior to its celebrated predecessor; and there is abundant evidence that the learned editor has bestowed much care and skill on its preparation. The publishers, also, are to be congratulated upon the attractive appearance and form of the present volume.

S. J. BAILEY.

The Construction of Deeds and Statutes. By Sir CHARLES E. ODGERS. Sweet & Maxwell, Ltd. xxxii and 330 pp. (15s. net.)

This book should be welcomed not only by students for whose requirements it has been particularly designed but also by practitioners. The selection of material has been judicious, and the result is a readable and useful work. The author apologises for the insertion of so many quotations from decisions; but it is felt that this is a desirable feature, particularly as the quotations have been carefully limited to *dicta* which state or elucidate general principles. It is clear that the author has been at pains to assist the student by explaining the underlying principles and distinguishing the various cases cited. So far as the reviewer has been able to test the book the author appears to have included practically all the leading cases in which rules or canons of construction have been enunciated.

It is the unfortunate task of the reviewer to search for defects; but those observed in this work by the reviewer are not substantial. At p. 144 it is stated that a covenant is void if the same person is both covenantor and covenantee either solely or with others. This slip should be corrected in subsequent editions. Section 82 of the L. P. Act, 1925, enacts, in effect, that a covenant entered into by a person (whether before or after January 1, 1926) with himself and one or more other persons is to be construed and can be enforced as if entered into with such other person or persons alone; but without prejudice to any order of the Court made before January 1, 1926. The reference in the footnote on the same page to the case of *Ridley v. Lee* is misleading for reasons which will appear from a perusal of the report of that case.

Perhaps one might expect to find at pp. 157–160 in connection with the terms “children” and “issue” some mention of section 33 of the Wills Act, 1837; but the author makes it clear that this book is not

intended to deal in detail with the technical rules affecting the interpretation of wills.

In any case these are very minor matters. It can be said with confidence that this is a really practical and useful book. In addition to the statement of the main canons of construction of documents and Acts of Parliament this work deals with the meaning of many words in common use; e.g., "forthwith", "on", "or", "and", "from", "etcetera", expressions relating to the computation of time, and the effect and application of various well-known Latin maxims. It can be predicted with equal confidence that this book will quickly repay in usefulness the modest sum of fifteen shillings at which it is published. It is the only really up-to-date book of its kind, and practitioners (who are so frequently called upon to interpret ambiguous or "home-drawn" documents) will find that this is just the book which they need.

Conveyancing Precedents under the Property Statutes of 1925.

By HUBERT A. ROSE, M.A., Barrister-at-Law. Third edition. London: Waterlow & Sons, Ltd., London Wall. 1939. lxxxii + 663 pp. (Price 25s. net.)

This collection of precedents has become so well known that it does not call for a lengthy review. The edition follows the lines of its predecessors and contains precedents marked by their brevity and lucidity. They are essentially workmanlike, and though one trained in another school may perhaps be permitted a sigh for the more formal periods of the past there is no doubt that the more modern dress is very popular. The precedents are primarily expressed in complete form and miscellaneous clauses are not collected. In some cases such as wills this gives rise to some inconvenience in cross-reference to other precedents, which at some additional cost in printing might be excluded, and some lack of elasticity. In fact the collection of wills is in the reviewer's opinion the weakest part of the work, subject to what we say of settlements, and should either be extended or omitted. The collection is not intended to be exhaustive and in wills the practitioner probably requires as much guidance, or more, than in any other owing to the variety of testator's wishes. It is suggested that trust instruments of settlements might well be left out on similar grounds. Practitioners who rely on a collection of precedents of this size are little likely unaided to draw settlements. The notes, which are printed in a type so small as to be very difficult to read, show a steady increase in bulk. It is noteworthy that considerably more than half the authorities cited have been decided since 1925. This is due no doubt to the fact that the notes are concerned mainly with the provisions of the 1925 legislation. It is doubted whether notes of this fragmentary character are now required after the Acts have been in force for nearly fifteen years, and there is much to be said for a collection of this character having very few notes. Notes should either deal with the law as a whole or not exist. In saying this we are not criticising the accuracy or lucidity of the notes so far as they go, for within these limits they are excellent. No two practitioners will have the same view either of notes or precedents and we can say in conclusion that we wish this volume well for its high standard and its utility.